No. 15-118
Title: Jesus C. Hernandez, et al., Petitioners
v.
Jesus Mesa, Jr., et al.
Docketed: July 27, 2015
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (12-50217)
Decision Date: April 24, 2015
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jul 23 2015	Petition for a writ of certiorari filed. (Response due August 26, 2015)
Aug 25 2015	Order extending time to file response to petition to and including September 25, 2015.
Aug 26 2015	Waiver of right of respondents Federal Respondents to respond filed.
Aug 26 2015	Brief amicus curiae of Government of the United Mexican States filed.
Aug 26 2015	Brief amici curiae of Amnesty International USA, et al. filed.
Aug 26 2015	Brief amici curiae of Paso del Norte Civil Rights Project, et al. filed.
Aug 26 2015	Brief amicus curiae of Dean Erwin Chemerinsky filed.
Sep 25 2015	Brief of respondent Jesus Mesa, Jr. in opposition filed.
Oct 14 2015	DISTRIBUTED for Conference of October 30, 2015.
Oct 15 2015	Reply of petitioners Jesus C. Hernandez, et al. filed. (Distributed)
Nov 2 2015	DISTRIBUTED for Conference of November 6, 2015.
Nov 9 2015	DISTRIBUTED for Conference of November 13, 2015.
Nov 16 2015	DISTRIBUTED for Conference of November 24, 2015.
Nov 30 2015	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Jan 17 2016	CIRCULATED.
Feb 29 2016	Brief of Federal Respondents in opposition filed.
Mar 16 2016	DISTRIBUTED for Conference of April 1, 2016.
Mar 18 2016	Supplemental brief of petitioners Jesus C. Hernandez, et al. filed. (Distributed)
Jun 6 2016	DISTRIBUTED for Conference of June 9, 2016.
Jun 13 2016	Rescheduled.
Sep 21 2016	DISTRIBUTED for Conference of October 7, 2016.
Oct 11 2016	Petition GRANTED. In addition to the questions presented by the petition the parties are directed to brief and argue the following question: Whether the claim in this case may be asserted under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388 (1971).
Nov 9 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the federal respondents.
Nov 14 2016	Motion to dispense with printing the joint appendix filed by petitioner Jesus C. Hernandez, et al.
Nov 15 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party from counsel for petitioners.

Nov 22 2016	The time to file the joint appendix and petitioners' brief on the merits is extended to and including December 2, 2016.
Nov 22 2016	The time to file respondents' briefs on the merits is extended to and including January 9, 2017.
Nov 28 2016	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Dec 1 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party from counsel for respondent Jesus Mesa, Jr.
Dec 2 2016	Brief of petitioners Jesus C. Hernandez, et al. filed.
Dec 8 2016	Brief amici curiae of Constitutional Law Scholars filed.
Dec 9 2016	Brief amicus curiae of Government of the United Mexican States filed.
Dec 9 2016	Brief amicus curiae of Professor Gregory C. Sisk in support of neither party filed.
Dec 9 2016	Brief amicus curiae of Constitutional Accountability Center filed.
Dec 9 2016	Brief amici curiae of Professors James E. Pfander, Carlos M. Vazquez, and Anya Bernstein filed.
Dec 9 2016	Brief amici curiae of The American Immigration Council, et al. filed.
Dec 9 2016	Brief amici curiae of Ten Law Professors filed.
Dec 9 2016	Brief amici curiae of Former Officials of U.S. Customs and Border Protection Agency filed.
Dec 9 2016	Brief amici curiae of Border Scholars filed.
Dec 9 2016	Brief amicus curiae of Restore the Fourth, Inc. filed.
Dec 9 2016	Brief amici curiae of Legal Historians filed.
Dec 9 2016	Brief amici curiae of Border Action Network, et al. filed.
Dec 9 2016	Brief amici curiae of Amnesty International USA, et al. filed.
Dec 9 2016	Brief amici curiae of Former Police Chiefs filed.
Dec 9 2016	Brief amici curiae of Mexican Jurists, Practitioners, and Scholars filed.
Dec 9 2016	Brief amici curiae of American Civil Liberties Union, et al. filed.
Dec 22 2016	SET FOR ARGUMENT on Tuesday, February 21, 2017.
Dec 30 2016	Record requested from the U.S.C.A. 5th Circuit.
Jan 9 2017	Brief of Federal Respondents filed.
Jan 9 2017	Brief of respondent Jesus Mesa, Jr. filed.
Jan 13 2017	Motion for divided argument filed by Federal Respondents.
Jan 17 2017	CIRCULATED.
Jan 17 2017	Brief amicus curiae of APA Watch filed. (Distributed)
Jan 17 2017	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Jan 23 2017	Motion for divided argument filed by Federal Respondents GRANTED.
Feb 1 2017	Record received from the U.S.C.A. 5th Circuit. The record is electronic and available on PACER.
Feb 8 2017	Reply of petitioners Jesus C. Hernandez, et al. filed. (Distributed)
Feb 21 2017	Argued. For petitioners: Robert C. Hilliard, Corpus Christi, Tex. For respondent Jesus Mesa, Jr.: Randolph J. Ortega, El Paso, Tex. For federal respondents: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C.
Jun 26 2017	DISTRIBUTED for Conference of June 26, 2017.
Jun 26 2017	Judgment VACATED and case REMANDED. Justice Thomas, dissenting. Justice Breyer, with whom Justice Ginsburg joins, dissenting. Justice Gorsuch took no part in the consideration or decision of this case. Opinion per curiam.
Jul 28 2017	JUDGMENT ISSUED.

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RECORD AND BRIEFS

15-118

No. ____

In the Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 23, 2015

QUESTIONS PRESENTED

In *Boumediene v. Bush*, this Court held that the Constitution's extraterritorial application "turn[s] on objective factors and practical concerns," not a "formal sovereignty-based test." 553 U.S. 723, 764 (2008). That holding is consistent with Justice Kennedy's concurrence two decades earlier in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), rejecting four Justices' formalist approach to extraterritorial application of the Fourth Amendment's warrant requirement.

The questions presented are:

1. Does a formalist or functionalist analysis govern the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area controlled by the United States?

2. May qualified immunity be granted or denied based on facts—such as the victim's legal status—unknown to the officer at the time of the incident?

LIST OF PARTIES TO THE PROCEEDINGS

The following petitioners were plaintiffs in the district court and appellants in the court of appeals: Jesus C. Hernández, individually and as the surviving father of Sergio Adrián Hernández Güereca, and as successor-in-interest to the estate of Sergio Adrián Hernández Güereca; and Maria Guadalupe Güereca Bentacour, individually and as the surviving mother of Sergio Adrián Hernández Güereca, and as successor-in-interest to the estate of Sergio Adrián Hernández Güereca.

Respondent Jesus Mesa, Jr. was a defendant in the district court and an appellee in the court of appeals.

The following entities and individuals were parties in two appeals that were consolidated by the court of appeals with the appeal that gave rise to this petition: the United States of America, the U.S. Department of Homeland Security, the U.S. Bureau of Customs and Border Protection, the U.S. Border Patrol, the U.S. Immigration and Customs Enforcement Agency, the U.S. Department of Justice, Ramiro Cordero, and Victor M. Manjarrez, Jr. Those two appeals are not the subject of this petition, and these entities and individuals are not respondents here. (As a courtesy, a copy of this petition has been sent to the Solicitor General.)

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INTRODUCTION

Seven years ago, in *Boumediene v. Bush*, this Court held that "*de jure* sovereignty" is not and has never been "the only relevant consideration in determining the geographic reach of the Constitution" because "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. 723, 764 (2008). That "century-old" functionalist approach applies across a range of constitutional provisions. *Id.* at 759. And it is consistent with Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*, in which he focused on practical concerns in deciding whether to apply the Fourth Amendment's warrant requirement abroad. 494 U.S. 259, 275-78 (1990).

Disregarding *Boumediene*'s functionalist approach, the en banc Fifth Circuit in this case concluded that the Constitution affords no protection to an unarmed teenager in a confined area of exclusive U.S. control who was shot to death at close range, without justification, by a U.S. Border Patrol agent standing on U.S. soil. Eschewing any consideration of pragmatic factors, the decision below relied on the formalist analysis of four Justices in *Verdugo-Urquidez* to hold that the Fourth Amendment's protection against excessive deadly force did not apply because the teenager was a Mexican citizen with no "significant voluntary connection" to the U.S., and the agent did not fire his weapon until the boy had crossed onto Mexican soil. App. 4a. If left standing, the Fifth Circuit's decision will create a unique no-man's land—a law-free zone in which U.S. agents can kill innocent civilians with impunity.

The Fifth Circuit achieves that result by adopting a reading of *Verdugo-Urquidez* that "cannot be squared with [this] Court's later holding in *Boumediene*." App. 31a (Dennis, J.). By contrast, the nation's other leading

border circuit, the Ninth Circuit, has adopted a more flexible approach that follows *Boumediene*'s functional inquiry. *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012). The Ninth Circuit's divergent precedent has recently been applied to the facts of an indistinguishable cross-border shooting and produced a diametrically opposite result. *See Rodriguez v. Swartz*, No. 14-cv-02251 (D. Ariz. July 9, 2015) (reproduced at 153a). This Court should grant certiorari "to clarify the reach of *Boumediene* and apply Justice Kennedy's functional test" to these all-too-frequently "recurring" facts. App. 33a, 43a (Prado, J.). This case provides an ideal vehicle for the Court "to decide whether its broad statements in *Boumediene* apply to our border with Mexico and to provide clarity to law enforcement, civilians, and the federal courts tasked with interpreting the Court's seminal opinions on the extraterritorial reach of constitutional rights." App. 33a (Prado, J.).

This Court should also grant certiorari to resolve an important question concerning qualified immunity, which protects officers from suit if they acted reasonably "in light of clearly established law and the information [they] possessed" at the time, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987): May qualified immunity be granted or denied based on facts—such as a person's legal status—that would not have been known to "a reasonable officer on the scene," but could be discovered only with "the 20/20 vision of hindsight," *Graham v. Connor*, 490 U.S. 386, 396 (1989)?

The answer to that question is no, as the Ninth Circuit correctly held in *Moreno v. Baca*, 431 F.3d 633, 642 (9th Cir. 2005). By reaching the opposite conclusion with respect to the plaintiff's parallel Fifth Amendment due-process claim, the decision below brings the Fifth Circuit into direct conflict with the Ninth Circuit and other circuits, and undermines the purposes of qualified im-

munity as described by this Court. If the Fifth Circuit's approach is allowed to flourish, officers guilty of unjustified conduct may be accorded immunity based on facts of which they were unaware. At the same time, officers otherwise deserving of immunity may be forced to stand trial because of later-discovered facts. In both scenarios, immunity would turn on the "the fortuity of the circumstances," not the nature of the conduct. *Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002).

This case thus presents the Court with a golden opportunity to decide two questions of pressing national importance, both of which are cleanly teed up. Absent this Court's intervention, Border Patrol agents in Texas will face one set of rules, while those operating in California and Arizona will face a very different set of rules, with agents in New Mexico left to wonder on which side of the divide their circuit will fall. This Court should put an end to this intolerable state of affairs, bring the law into conformity, and make clear that our border with Mexico is not an on/off switch for the Constitution's protections against the unreasonable use of deadly force.

OPINIONS BELOW

The decision of the en banc court of appeals is reported at 785 F.3d 117 and reproduced at 1a. The panel's decision is reported at 757 F.3d 249 and reproduced at 54a. The district court's decision on the claims against Agent Jesus Mesa is unreported and reproduced at 109a. The district court's decision on the claims against the United States is reported at 802 F. Supp. 2d 834 and reproduced at 120a.

JURISDICTION

The en banc court of appeals entered its judgment on April 24, 2015. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

A. Factual Background

1. On a summer day in 2010, a fifteen-year-old boy named Sergio Hernández was playing with three friends in the concrete culvert separating El Paso, Texas and Juarez, Mexico. App. 146a. Once the flowing Rio Grande, the culvert splits the cities like a cement river, with the invisible borderline running through it. To one side, toward El Paso, is a banked incline that leads to an 18-foot fence built by the U.S. as "part of a 650-mile, $2.8 billion border wall." Andrew Rice, *Life on the Line*, N.Y. Times Magazine, July 28, 2011, http://nyti.ms/1H7VvX9; *see* App. 146a. To the other side, toward Juarez, is another incline leading to a wall topped with a guardrail. In between is a "concrete bank where the now-dry, 33-feet (10-meter) wide Rio Grande is." Christopher Sherman & Olivia Torres, *Mexico teen killed by US Border Patrol, anger high*, Scranton Times Tribune, June 9, 2010, http://bit.ly/1JJkCW9. Overhead, "a railroad bridge linking the two nations" spans the culvert. *Id.* A photograph of the bridge and the culvert can be found at http://bit.ly/1IHkVPZ and in the appendix at 181a.

Like countless children before them, Sergio and his friends were playing a game in which they dared each other to run up the culvert's northern incline, touch the U.S. fence, and then scamper back down to the bottom. App. 146a. Because they were not trying to smuggle themselves into the U.S., the boys chose a site in plain view of the Paso del Norte Port of Entry—one of the busiest border crossings in the United States. App. 146a. And because the boys meant no harm, they were unarmed. App. 147a.

While the boys were playing, a U.S. border guard patrolling the culvert on bicycle seized one of them as

they ran down the ramp. App. 146-47a. The other boys fled back into Mexico, with Sergio running past the agent, Jesus Mesa, toward a pillar beneath the bridge on the Mexican side of the culvert. *Id.* Within seconds, Agent Mesa drew his firearm, aimed it at Sergio, and shot him in the head, just next to his eye. *Id.* Neither Agent Mesa nor any of the other Border Patrol agents who swarmed the scene offered the boy medical aid of any kind; instead, they got back on their bikes and left. App. 147a. Sergio died on the spot. *Id.*

Although just 60 feet separated Sergio from Agent Mesa at the time of the shooting, Sergio was formally in Mexican territory when he was killed, while Mesa was formally in the United States. App. 147a. CNN, *Youth fatally shot by border agent*, June 10, 2010, http://cnn.it/1gjK1t4. And Sergio, it turned out, was a Mexican citizen, App. 145a—a fact about which Agent Mesa could not have known when he pulled the trigger—marking "the second death of a Mexican at the hands of Border Patrol officers in less than two weeks." Sherman & Torres, *Mexico teen killed by US Border Patrol.*

2. One day after the shooting, federal authorities began claiming that Agent Mesa shot Sergio in self-defense. The FBI's El Paso Division put out a press release entitled "Assault on Federal Officer Investigated." FBI El Paso Press Release, June 8, 2010, http://1.usa.gov/1JUAdQ5. The statement asserted that Mesa "responded to a group of suspected illegal aliens being smuggled into the U.S. from Mexico," and Sergio "began to throw rocks" at Mesa from across the border. *Id.* According to the FBI, Mesa fired his gun only after he "gave verbal commands" for Sergio to "stop and retreat," and Sergio and the other boys "surrounded the

agent and continued to throw rocks at him." *Id.*; *see also* App. 147a.

But two days later, "several cellphone videos" surfaced that "show[ed] a different story." Bob Ortega & Rob O'Dell, *Deadly border agents incident cloaked in silence*, Arizona Republic, Dec. 16, 2013, http://bit.ly/1bHMq6p; *see* CNN, *Youth fatally shot by border agent*, June 10, 2010, http://cnn.it/1gjK1t4. The videos show that "Mesa wasn't surrounded" by the boys when he fired his weapon, nor did Sergio throw any rocks at him. Ortega & O'Dell, *Deadly border agents incident cloaked in silence*. In one video, Sergio is "visible, peeping out from behind a pillar beneath a train trestle. He sticks his head out; Mesa fires; and the boy falls to the ground, dead." *Id.* As CNN reported at the time, the video "contradicts [the FBI's] account." CNN, *Youth fatally shot by border agent*.

Even before the videos came to light, the shooting sparked outrage on both sides of the border. In Mexico, the government condemned it as unjustified. *Id.* "The growing frequency of this kind of event," Mexico's Foreign Ministry lamented, "reflects a troubling trend in the use of excessive force by some border authorities." Tim Padgett, *After Teen's Death, a Border Intifadeh?*, TIME, June 10, 2010, http://ti.me/1CmTbiz. The Ministry cited records showing that "the number of Mexicans who ha[d] been killed or wounded by U.S. border authorities ha[d] increased from five in 2008 to 12 in 2009," and then to 17 in the first half of 2010. CNN, *Youth fatally shot by border agent*.

3. In the aftermath of Sergio's death, criminal prosecutors in both the U.S. and Mexico investigated the shooting. But to no avail: The Justice Department lacked jurisdiction to prosecute under federal criminal civil-

rights laws and the federal murder statute because Sergio was on foreign soil at the time of his death and was not a U.S. citizen. *See* 18 U.S.C. §§ 242 & 1119; DOJ Press Release, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca*, Apr. 27, 2012, http://1.usa.gov/1Cu6qy0 (explaining that DOJ lacked jurisdiction). And Mexican prosecutors, though they had jurisdiction to prosecute Mesa as a formal matter, could not do so in practice: After the State of Chihuahua issued a murder warrant for Mesa's arrest, the U.S. refused a request for extradition. Marisela Lozano, *Chihuahua officials seek extradition of border agent*, El Paso Times, May 4, 2012, http://bit.ly/1HkFZcF.

That left the Border Patrol to handle any discipline internally. Federal regulations restrict the use of deadly force by Border Patrol agents, requiring that an agent first have "reasonable grounds to believe that such force is necessary to protect [himself or herself] or other persons from the imminent danger of death or serious physical injury." 8 C.F.R. § 287.8(a)(2); *see also id.* § 287.8(a)(1)(iii). Customs and Border Protection (CBP) has incorporated this requirement into its use-of-force policies—policies the agency did not make publicly available until recently, in response to public outcry. *See* U.S. Customs & Border Prot., HB 4500-01C, Use of Force Policy, Guidelines and Procedures Handbook, at 3 (May 2014), http://1.usa.gov/1nADcFv; Ortega & O'Dell, *Deadly border agents incident cloaked in silence*.

Despite these restrictions, Border Patrol agents have used deadly force in a number of "highly questionable" instances in recent years, and have done so with impunity. *Id.* An investigation conducted by the *Arizona Republic* revealed that agents and CBP officers "killed at least 42 people" from 2005 to 2013, "all but four of

which [were killed] along or near the southwest border." *Id.* Yet, "[i]n none of the 42 deaths is any agent or officer publicly known to have faced consequences—not from the Border Patrol, not from [CBP] or Homeland Security, not from the Department of Justice, and not, ultimately, from criminal or civil courts." *Id.* "Internal discipline," moreover, "is a black hole." *Id.*

This "lack of accountability" and "culture of secrecy about agents' use of deadly force" has persisted notwithstanding increased outside scrutiny. *Id.* In 2013, the Police Executive Research Forum—"an independent group of law enforcement experts" commissioned by CBP—studied 67 shootings that occurred from 2010 to 2012 (nearly a third of them fatal). Brian Bennett, *Border Patrol absolves itself in dozens of cases of lethal force*, L.A. Times, June 15, 2015, http://lat.ms/1HK7SN5. The report "criticized the Border Patrol for a 'lack of diligence' in investigating its deadly incidents," *id.*, and concluded that "[t]oo many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force." U.S. Customs and Border Prot., Use of Force Review: Cases and Policies, at 6 (Feb. 2013), http://1.usa.gov/1nKOBQS.

Rather than reform its ways, the Border Patrol first tried to keep the report secret, refusing even to give Congress a copy until it was leaked to the *Los Angeles Times*. Bennett, *Border Patrol absolves itself in dozens of cases of lethal force*. Then, under pressure to act, the agency conducted a separate review of the same 67 cases—only this time internally—and in June 2015 "absolved agents of misconduct in all but three cases, which are still pending." *Id.* Keeping to "its tradition of closing ranks around its paramilitary culture," the Border Pa-

trol disciplined only two agents for these shootings—and "[b]oth received oral reprimands." *Id.*

B. Procedural History

Six months after Sergio Hernández's death, in early 2011, his parents sued Agent Mesa in federal district court in Texas, alleging that the agent violated the Fourth and Fifth Amendments to the U.S. Constitution. App. 151a. Jurisdiction over these claims was based on 28 U.S.C. § 1331.[1]

Mesa moved to dismiss, arguing that Sergio lacked any constitutional protection because he "was an alien without voluntary attachments to the United States" who was "standing in Mexico when he was killed." App. 113-14a. Mesa did not attempt to justify his actions or to explain why they were reasonable in light of the circumstances, nor did he claim to have had knowledge—at the time of the shooting—of the facts that, in his view, were constitutionally dispositive: Sergio's citizenship, the nature of his attachments to the U.S., and his precise location along the border.

The district court's decision. The district court dismissed all claims. App. 119a, 139-40a. It concluded that the Constitution's deadly-force protections, as applied to non-citizens like Sergio, stop at the border. App. 116-18a. The district court declined to follow this Court's decision in *Boumediene*, calling it "inapposite" because it "says nothing of the Fourth Amendment." App. 114a. Applying a formalistic test instead, the court declined to grant constitutional protection because Sergio "was

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[1] The family also brought several tort claims against the United States. Those claims are not at issue in this petition, and the United States is not a respondent here.

standing underneath the Mexican side of the Paso Del Norte Bridge when Agent Mesa shot him." App. 131a. The court also dismissed the Fifth Amendment claim. App. 118a.

The Fifth Circuit panel's decision. A divided panel of the Fifth Circuit affirmed in part and reversed in part. App. 54-108a. It fractured badly on the claims against Agent Mesa, and held that the Fifth Amendment (but not the Fourth Amendment) applies. App. 71-89a. The court further held that Mesa is not entitled to qualified immunity because "[n]o reasonable officer" would think it permissible to kill an unarmed teenager just because he happened to be an alien with no significant voluntary connections to the U.S. who was standing outside the border—facts Mesa did not know when he pulled the trigger. App. 103a.

On the extraterritoriality question, two of the judges rejected the district court's formalistic analysis, finding that it "no longer represents the Supreme Court's view" after *Boumediene*, which held that "practical considerations" and objective factors "govern[] the application of constitutional principles abroad." App. 66a. Judge Prado explained that *Boumediene* "appears to repudiate the formalistic reasoning of *Verdugo-Urquidez*'s sufficient connections test" in favor of the "'practical and functional' test articulated in Justice Kennedy's [*Verdugo-Urquidez*] concurrence." App. 76-77a. And Judge Dennis stressed that a formalistic reading of *Verdugo-Urquidez* "cannot be squared with the Court's later holding in *Boumediene*." App. 105a. Judge DeMoss, by contrast, distinguished *Boumediene* on its facts and took the view that the Constitution should not apply "because there is a border between the United States and Mexico," and

Agent Mesa shot Sergio after he ran across it. App. 107-8a.

The en banc Fifth Circuit's decision. Rehearing the case en banc, the Fifth Circuit produced a per curiam opinion that masked deep divisions among the judges, many of whom wrote separately. Because the court was "divided on the question whether Agent Mesa's conduct violated the Fifth Amendment," and "[r]easonable minds can differ" about whether *Boumediene*'s functional approach requires applying constitutional protection here, the court chose not to decide the Fifth Amendment question. App. 5-6a. Instead, "avail[ing] itself of the latitude afforded by *Pearson v. Callahan*," 555 U.S. 223 (2009), the court held that Mesa is entitled to qualified immunity even assuming he violated the Fifth Amendment because its applicability "was not clearly established, under these facts, in 2010." App. 4a, 7a. The court acknowledged that *Boumediene* represents the "strongest authority for the plaintiffs," but determined that the case does not speak "with the directness that the 'clearly established' standard requires." App. 5-6a.

As to the Fourth Amendment, the court reached the merits and held that "pursuant to *United States v. Verdugo-Urquidez*," Sergio "cannot assert a claim under the Fourth Amendment" because he was "a Mexican citizen who had no 'significant voluntary connection' to the United States" and "was on Mexican soil at the time he was shot." App. 4a. The court did not discuss any other factor, including whether applying the Fourth Amendment in this case would be "impracticable and anomalous"—a factor that Justice Kennedy found critical in *Verdugo-Urquidez* when he concluded that "the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." *See* 494 U.S. at 278.

Judge Prado concurred, joined by Judges Dennis and Graves "except to the extent that [his opinion] adopts the en banc court's reasons for denying the Fourth Amendment claim." App. 50a (Graves, J.); *see also* App. 31a (Dennis, J.). Although Judge Prado adhered to his previous position on the Fifth Amendment, he reversed course on qualified immunity, apparently persuaded that "[t]he depth of [the court's] disagreement about the meaning of *Boumediene*, *Verdugo-Urquidez*, and [*Johnson v.*] *Eisentrager*," 339 U.S. 763 (1950), underscores the law's uncertainty. App. 42a.

In separate opinions, Judges Dennis and Graves expressed disagreement with the en banc court's formalistic Fourth Amendment test. Judge Dennis reiterated his view that such an approach conflicts with *Boumediene*, App. 31a, while Judge Graves agreed that the Fourth Amendment claim "ha[s] force," but disagreed "that this court should forgo the adjudication" of that claim—effectively dissenting from the per curiam opinion on this point. App. 50a.

Judge Jones, responding to her colleagues' "suggest[ion]" that "the Supreme Court take . . . up" the case, App. 22a, wrote to provide her views, which were shared by Judges Smith, Clement, and Owen. App. 7-30a She criticized the en banc "compromise" opinion for ducking the Fifth Amendment question, saying that it "simply delays the day of reckoning." App. 7a. Taking a formalistic position, she thought it "clear that United States constitutional rights do not extend to aliens who (a) lack any connection to the United States and (b) are injured on foreign soil," and thus would "resolve this appeal on the first prong of qualified immunity analysis." *Id.* Although she acknowledged that *Boumediene*'s functionalist approach could "ultimately be extended to determine

the extraterritorial reach" of the constitutional provisions at issue here, she concluded that "this court may not step ahead of the Supreme Court." App. 19a.

REASONS FOR GRANTING THE PETITION

I. This case presents an ideal vehicle to clarify the correct approach to the Constitution's extraterritorial application after *Boumediene*—a question that has bedeviled courts and commentators.

This Court held in *Boumediene* that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. Yet the Fifth Circuit refused to heed that mandate. It did not consider *any* practical concerns and applied formalism alone. Relying exclusively on *Verdugo-Urquidez*, the Fifth Circuit held that Sergio Hernández lacks a constitutional claim because he was a Mexican citizen with no "significant voluntary connection" to the U.S. and "was on Mexican soil at the time he was shot." App. 4a. That holding contravenes *Boumediene* and diverges with the Ninth Circuit's extraterritoriality precedent—precedent that has already been applied to indistinguishable facts and produced conflicting results. This Court should take the opportunity "to clarify the reach of *Boumediene*" and apply a functionalist analysis to these "recurring" facts. App. 33a, 43a (Prado, J.).

A. *Boumediene*'s functionalist approach dates back more than 100 years. It is embodied in cases arising out of different continents and centuries and concerning a wide array of constitutional provisions. Taken together, these cases repudiate the Fifth Circuit's strict sovereignty-based rule.

At "the dawn of the 20th century," in what came to be known as the *Insular Cases*, this Court began its extraterritoriality jurisprudence by addressing whether

the Constitution "applies in any territory that is not a State." *Boumediene*, 553 U.S. at 756. *See De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904). Adopting a pragmatic approach, this Court created "the doctrine of territorial incorporation," under which certain fundamental constitutional rights (but not all constitutional rights) apply to noncitizens in unincorporated territories. *Boumediene*, 553 U.S. at 757-58. Rather than "enforc[e] all constitutional provisions 'always and everywhere,'" the Court "not[ed] the inherent practical difficulties" of full incorporation and considered each provision individually, sensitive to the specific concerns presented in each case. *Id.* at 759 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)). As this Court put it in *Boumediene*, "the Court devised in the *Insular Cases* a doctrine that allowed it to use its power sparingly and where it would be most needed." *Id.*

Functional considerations also proved "decisive" half a century later in *Reid v. Covert*, 354 U.S. 1 (1957), which held that the spouses of American servicemen living on military bases abroad were entitled to trial by jury. *Boumediene*, 533 U.S. at 760. Although the plurality opinion rested primarily on the petitioners' status as American citizens, two concurring opinions by Justices Frankfurter and Harlan—"whose votes were necessary to the Court's disposition"—instead relied on "practical considerations" unrelated to citizenship. *Id.* Justice Frankfurter rejected the "broad principle" that the Constitution has no application beyond the "limits of the United States," endorsing a flexible approach that looks at the "specific circumstances of each particular case." *Reid*, 354 U.S. at 54. And Justice Harlan likewise favored

pragmatism—not a "rigid and abstract rule." *Id.* at 75. To him, the "crucial" considerations are "the particular circumstances, the practical necessities, and the possible alternatives" presented, as well as whether enforcement would be "impractical and anomalous." *Id.* "The question is one of judgment," he explained, "not compulsion." *Id.*

"Practical considerations [also] weighed heavily" in *Johnson v. Eisentrager*, 339 U.S. 763, which denied access to the writ of habeas corpus to "enemy aliens" imprisoned "in Germany during the Allied Powers' post-war occupation." *Boumediene*, 553 U.S. at 762. The Court's opinion "stressed the difficulties" of granting this right and the "practical barriers" it would pose. *Id.* at 762-63. Although the opinion includes language suggesting that the Court may have "adopted a formalistic, sovereignty-based test," *Boumediene* "reject[ed] this reading," finding that "practical considerations" were "integral" to *Eisentrager*'s outcome. *Id.* at 762-63. *Boumediene* also expressed doubt that *Eisentrager* "used the term sovereignty only in the narrow technical sense," without taking into consideration "the degree of control" exerted by the U.S. and whether the U.S. could act "without accountability." *Id.* at 763. Had *Eisentrager* adopted a "bright-line test," *Boumediene* emphasized, its holding would have been "inconsistent with the functional approach to questions of extraterritoriality" in this Court's cases. *Id.* at 764.

Finally, *Boumediene* drew on Justice Kennedy's concurrence in *Verdugo-Urquidez*, which adopted Justice Harlan's "'impracticable and anomalous' extraterritoriality test" and applied it "in the Fourth Amendment context." *Id.* at 760. Justice Kennedy expressly disagreed with the formalist reasoning of the four other Justices to join the *Verdugo-Urquidez* opinion, and instead "advocated a functional analysis of extraterritoriality" derived from the *Insular Cases* and Justice Harlan's

concurrence in *Reid*. App. 38a (Prado, J.). Conducting that analysis, Justice Kennedy listed a number of "conditions and considerations of this case [that] would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous," including "[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials." *Verdugo-Urquidez*, 494 U.S. at 277. These practical considerations, Justice Kennedy concluded, "all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." *Id.*

After surveying this Court's cases, *Boumediene* observed that the "common thread uniting" them is their shared recognition that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. Although the Court acknowledged that some cases arguably could be read to support the notion that "*de jure* sovereignty" is "the only relevant consideration in determining the geographic reach of the Constitution," the Court refused to read its cases "to conflict in this manner." *Id.*

Having rejected a "formal sovereignty-based test," *Boumediene* applied a functional framework and held that detainees in Guantánamo Bay, Cuba, are "entitled to the privilege of habeas corpus to challenge the legality of their detention." *Id.* at 764, 771. The Court based its conclusion on the "objective degree of control" and "practical sovereignty" that the U.S. exerts over the Guantánamo Bay prison, and found that these factors outweighed the "costs to holding the Suspension Clause applicable," which are not "dispositive." *Id.* at 754, 769.

B. The Fifth Circuit's decision cannot be reconciled with this Court's functional approach, as articulated in

Boumediene. The decision holds that the Fourth Amendment does not apply here because Sergio Hernández was a Mexican citizen with no significant voluntary connection to the U.S. who was "standing on Mexican soil at the time he was shot." App. 4a. That is the extent of the Court's analysis. There is no discussion of any of the pragmatic and context-specific considerations *Boumediene* identified as central to extraterritoriality analysis, including whether the U.S. effectively controls the border area where Sergio was killed. Nor is there any mention of whether applying constitutional protection in these circumstances would be "impracticable and anomalous"—an inquiry Justice Kennedy twice emphasized as critical, first in his concurring opinion in *Verdugo-Urquidez*, and then again in his opinion for the Court in *Boumediene*.

Eschewing those opinions, the Fifth Circuit instead relied on the Court's opinion in *Verdugo-Urquidez*, which held that the Fourth Amendment does not apply "to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." 494 U.S. at 261. The Court based this holding primarily on the Fourth Amendment's text (its use of the phrase "the people") and reasoned that Verdugo-Urquidez "had no voluntary connection with this country that might place him among 'the people.'" *Id.* at 273. The Court also looked to the pre-*Boumediene* caselaw, and noted that a "global view" of the Fourth Amendment "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries," including its "foreign policy operations." *Id.*

Although Justice Kennedy joined the *Verdugo-Urquidez* opinion (thus supplying the fifth vote), and did not believe that his views "depart[ed] in fundamental respect from the opinion of the Court," he wrote sepa-

rately to explain why he disagreed with the formalist approach of the other four Justices. 494 U.S. at 275. He could not "place any weight on the reference to 'the people' in the Fourth Amendment," and instead focused on pragmatic considerations: whether "adherence to [the] warrant requirement" abroad would be "impracticable and anomalous." *Id.* at 276.

By extending *Verdugo-Urquidez*'s "significant voluntary connection" test beyond the warrant requirement—without asking whether extraterritorial application would be "impracticable and anomalous" under the circumstances—the Fifth Circuit disregarded the "common thread uniting" this Court's cases and flouted *Boumediene*. 553 U.S. at 764. This Court should grant certiorari to reassert its holding in *Boumediene* and make clear that the Fourth Amendment's applicability to a deadly shooting at the U.S.-Mexico border "turn[s] on objective factors and practical concerns, not formalism." *Id.*

C. Certiorari is also warranted because the decision below departs from the Ninth Circuit's extraterritoriality framework, which applies *Verdugo-Urquidez*'s "significant voluntary connection" test in conjunction with—rather than instead of—"the 'functional approach' of *Boumediene*." *Ibrahim*, 669 F.3d at 997.

1. Unlike the Fifth Circuit, the Ninth Circuit recognizes that "the border of the United States is not a clear line that separates aliens who may bring constitutional challenges from those who may not." *Id.* at 995. Quoting *Boumediene*, the Ninth Circuit in *Ibrahim* explained that "[i]n determining the constitutional rights of aliens outside the United States, the [Supreme] Court applies a 'functionalist approach' rather than a bright-line rule." *Id.* The Ninth Circuit held that it was "bound to follow" this Court's functionalist approach in addition to *Verdu-*

go-Urquidez's "significant voluntary connections" test, thereby integrating an otherwise rigid test into a functionalist analysis. *Id.* at 997. Although the court ultimately determined that Ibrahim had sufficient connections with the U.S. and applied the Constitution on that basis, there is no reason to think that having such connections is a *prerequisite* to extraterritoriality in the Ninth Circuit, as it is in the Fifth Circuit. That would be a formalist approach—not a functionalist one.

Indeed, the Ninth Circuit's functionalist approach has already been applied to indistinguishable facts and led to an outcome that directly conflicts with the decision below. In *Rodriguez v. Swartz*, a Border Patrol agent shot and killed an unarmed Mexican teenager on the Mexican side of the border, and his parents asserted a Fourth Amendment claim against the agent. No. 14-cv-02251 (D. Ariz. July 9, 2015) (App. 153a). Because the agent was in Arizona when he fired his weapon, as opposed to Texas, the court applied "*Boumediene* in conjunction with *Verdugo-Urquidez*," as the Ninth Circuit requires. *Id.* at 12 (App. 168a). Under that framework, the court held that Rodriguez had a "fundamental right to be free from the United States government's arbitrary use of deadly force." *Id.* at 14 (App. 171a). The court did not give dispositive weight to the voluntary-connections factor, but assessed it along with "the many practical considerations and factors the Supreme Court of the United States has ordered the lower courts to consider." *Id.* at 16 (App. 173a). And it reached the opposite conclusion.

Thus, as *Rodriguez* illustrates, under the Ninth Circuit's approach, *Boumediene* applies and the "voluntary connections" factor is not given dispositive weight, but is considered alongside practical factors. Under the Fifth Circuit's approach, by sharp contrast, *Boumediene* is treated as irrelevant and an alien must have "significant

voluntary connections" to the U.S. to receive any Fourth Amendment protection at all beyond our formal borders.

Rodriguez expressly acknowledged the divergence between the two approaches: "Applying [the Ninth] Circuit's case law"—which requires "[w]eighing all of the [relevant] factors"—to indistinguishable facts generates "a different conclusion from that of the Court of Appeals for the Fifth Circuit in *Hernandez*." *Id.* at 7, 16 (App. 162a, 172a). Such a dramatic divergence between the two biggest border circuits on such a fundamental constitutional question cannot be tolerated. And because the Ninth Circuit is bound by its panel decision in *Ibrahim*, there is no need to await its decision in *Rodriguez*.

2. The disagreement in this area is not limited to just these two circuits or the interplay between *Boumediene* and *Verdugo-Urquidez*. For more than two decades, courts and commentators have struggled in interpreting the precise meaning of *Verdugo-Urquidez*, with some going so far as to call the opinion a "plurality." The Second, Third, and Ninth Circuits, for example, have noted that only "a plurality of the Court" embraced the opinion's formalist reasoning. *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991); *see United States v. Boynes*, 149 F.3d 208, 211 n.3 (3d Cir. 1998) (explaining that "two of the six justices in the *Verdugo-Urquidez* majority coalition did not join the other four justices' reasoning completely"); *Sissoko v. Rocha*, 440 F.3d 1145, 1167 n.33 (9th Cir. 2006) (referring to "the plurality opinion in *United States v. Verdugo-Urquidez*"), *superseded by* 509 F.3d 947 (9th Cir. 2007). Judge Bates has similarly described the *Verdugo-Urquidez* "plurality opinion" as "suggesting that certain rights under the First and Fourth Amendments inure to the benefit of only those with sufficient connections to the United States." *Kadi v. Geithner*, 42 F. Supp. 3d 1, 25 (D.D.C. 2012). And Professor Gerald Neuman has explained that Justice Kennedy's *Verdugo-*

Urquidez concurrence "diverged so greatly from [the Court's] analysis and conclusions that [Chief Justice] Rehnquist seemed to really be speaking for a plurality of four." *Whose Constitution?*, 100 Yale L.J. 909, 972 (1991).

This confusion has only grown after *Boumediene*. Since that decision, "uncertainty has reigned" around how courts should determine when constitutional rights apply abroad. Joshua Geltzer, *Of Suspension, Due Process, and Guantanamo*, 14 U. Pa. J. Const. L. 719, 720 (2012); *see also* Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 Colum. L. Rev. 973 (2009). "Courts and commentators alike have already felled many forests grappling with the hard questions [the case] leaves in its wake." Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 Notre Dame L. Rev. 2107 (2009). This case presents an ideal vehicle for this Court to resolve the confusion.

D. By applying the wrong methodology, the decision below reached the wrong outcome. Had the Fifth Circuit applied a functionalist analysis, the court would have held that the Fourth Amendment protects against the arbitrary use of deadly force under these circumstances.

Sergio Hernández was killed in a culvert that U.S. officials patrol and effectively control. Border Patrol agents exercise their duties "within feet" of where he was shot, and routinely "act on or even across" the border to "ensur[e] that [the] physical border is not the first or last line of defense, but one of many." App. 84a-85a. And when they do so, they "are not 'answerable to' U.S. border partners." App. 86a. Thus, "even though the United States has no formal control or de facto sovereignty over the Mexican side of the border, the heavy presence and regular activity of federal agents across a

permanent border without any shared accountability weigh in favor of recognizing" constitutional protection. *Id.*

Moreover, this case triggers none of the factors that make extending constitutional rights "impracticable and anomalous." *Boumediene*, 553 U.S. at 769. Border Patrol agents are already required to "use the minimum non-deadly force necessary" at all times, 8 C.F.R. § 287.8(a)(1)(iii), and are constitutionally liable for using deadly force without justification against any individual in the U.S., and against American citizens across the border. Recognizing a Fourth Amendment right in this case would have the "unremarkable effect" of applying the same constitutional requirement to foreign citizens who happen to be standing just south of the border. App. 88a. That would not force agents to change their conduct to conform to new standards; it would simply create an enforcement mechanism for rules already in place.

Nor would applying Fourth Amendment protection in this case subject activities like U.S. surveillance in Mexico to constitutional scrutiny, as the panel below incorrectly believed. App. 79a. "This case addresses only the use of deadly force by U.S. Border Patrol agents in seizing individuals at and near the United States-Mexico border." *Rodriguez*, No. 14-cv-02251, at 15 (App. 172a). It does not involve extraterritoriality of the Fourth Amendment more broadly.

While the costs of recognizing a Fourth Amendment right here are minimal, the costs of denying it are high. If this Court allows the Fifth Circuit's decision to stand, it will hand the Executive unaccountable power of the kind the Court has previously refused to grant. In 2004, this Court rejected the government's argument that U.S. courts lack jurisdiction over Guantánamo Bay, holding that the Executive may not exempt its activities from

judicial review. *Rasul v. Bush*, 542 U.S. 466, 486 (2004). The same separation-of-powers concern animated this Court's decision in *Boumediene*, which observed that "[w]ithin the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." 553 U.S. at 797. It seems no stretch to say the same of the Executive's power to kill a person.

The Fifth Circuit's decision also gives Border Patrol agents the ability to "switch the Constitution on or off"—a power the *Boumediene* Court explicitly denied the Executive. *Id.* at 727. The en banc opinion tells agents that if they simply ensure that Mexicans are standing on the Mexican side of the border, they can shoot with impunity, free of constitutional constraints. Not only does that resurrect the territorial formalism that *Boumediene* rejected; it also enables the Executive to play territorial arbitrage with the Constitution—manipulation that *Boumediene* forbids. *Id.*

II. The Fifth Circuit's qualified-immunity holding creates a circuit split and is in serious tension with the purposes of qualified immunity as articulated in this Court's cases.

Certiorari is equally warranted on the second question presented: Can qualified immunity be granted or denied based on an officer's after-the-fact discovery of a person's legal status? By answering yes, the decision below creates a circuit split with the Ninth Circuit's decision in *Moreno v. Baca*, 431 F.3d 633, as well as decisions from other circuits, and undermines the purposes of qualified immunity as described by this Court.

A. The Ninth Circuit's decision in *Moreno* involved the search and seizure of a parolee without reasonable suspicion. *Id.* at 636. Although Moreno's status as a

parolee arguably made the search and seizure constitutional because parolees have diminished Fourth Amendment rights, the officers did not learn that he was on parole until "*after* searching and detaining him." *Id.* at 637 (emphasis added). Nonetheless, the officers argued that they were entitled to qualified immunity even if their search violated the Fourth Amendment because "it was not clearly established that Moreno had *any* right to be free from suspicionless searches because of his parole status." *Id.* at 642 (emphasis added).

The Ninth Circuit rejected that argument and denied qualified immunity. *Id.* Had the officers "known of the parole condition at the time of the search and seizure," the court explained, they might have been entitled to qualified immunity. *Id.* But "[b]ecause the Deputies did not know of Moreno's parole status" when "they searched and seized him," the Ninth Circuit held that this later-discovered fact "cannot justify their conduct." *Id.* "At the time of the incident," the court elaborated, "it was clearly established that the facts upon which the reasonableness of a search or seizure depends, whether it be an outstanding arrest warrant, a parole condition, or any other fact, must be known to the officer at the time the search or seizure is conducted." *Id.*

Three weeks later, the en banc Ninth Circuit expressly "agree[d]" with *Moreno*'s rule that qualified immunity is unavailable to officers who "justify their actions retroactively" based on facts unknown to them at the time of the alleged misconduct. *Motley v. Parks*, 432 F.3d 1072, 1088 (9th Cir. 2005), *overruled in part on other grounds by United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc). To receive qualified immunity, the court emphasized, an officer "must be aware" of the key facts "before" committing the disputed act. *Id.*

The decision below cannot be reconciled with *Moreno*. Without deciding whether Agent Mesa violated Sergio Hernández's Fifth Amendment rights—and thus assuming a violation for qualified-immunity purposes—the Fifth Circuit granted Mesa immunity based on the fact that Sergio was later determined to be a Mexican citizen "who had no significant voluntary connection to, and was not in, the United States" when he was killed. App. 5a. The court found that Mesa was not "reasonably warned" that killing someone under these circumstances "violated the Fifth Amendment." *Id.* The court reached that conclusion even though "[a]t the time of the incident" Mesa "did not know of [Sergio's] status" as a Mexican citizen with no significant U.S. connections, thus allowing Mesa to rely on that fact to "justify [his] conduct." *Moreno*, 431 F.3d at 642. That holding—that a later-discovered fact justified immunity even where it was not known to the officer when he acted—is exactly the opposite of what the Ninth Circuit held in *Moreno*.

As a result of these contradictory conclusions, there is now a "circuit split between, among other rulings, the en banc Fifth Circuit's analysis in *Hernandez* and the Ninth Circuit's 2005 decision in *Moreno*." Steve Vladeck, *Cross-Border Shootings as a Test Case for the Extraterritorial Fourth Amendment*, Just Security, July 10, 2015, http://bit.ly/1KeG31y. Consequently, if this shooting had occurred at the Mexican border in Arizona rather than Texas, the agent would not be entitled to qualified immunity and the court could not have avoided the constitutional question on the merits, as the Fifth Circuit did here.

And the risk of inconsistent outcomes is no mere hypothetical. Just this month, the U.S. District Court of Arizona held—on facts nearly identical to those here—that qualified immunity was *unavailable* to a border agent who shot and killed an unarmed teenager on the

Mexican side of the border. *Rodriguez*, No. 14-cv-02251, at 20 (App. 178a). As in this case, the agent "was an American law enforcement officer standing on American soil" who was "well-aware of the limits on the use of deadly force against U.S. citizens and non-citizens alike within the United States." *Id.* at 19-20 (App. 177a). And, as in this case, the agent could not have known "whether [the boy] was a United States citizen or the citizen of a foreign country, and if [he] had significant voluntary connections to the United States." *Id.* at 20 (App. 177a). Instead, as here, "[i]t was only after [the agent] shot [the boy] and learned of [his] identity as a Mexican national that he had any reason to think he might be entitled to qualified immunity." *Id.* (App. 177-78a). But because that case arose from a shooting at the Arizona border—not the Texas border—the district court, following *Moreno*, denied the border agent qualified immunity because the agent only "learned of [the boy's] status as a non-citizen *after* the violation." *Id.* (App. 178a) (citing *Moreno*, 431 F.3d at 641).

Because *Rodriguez* simply "highlights an already *existing* circuit split," it cannot be resolved by the Ninth Circuit on appeal. Vladeck, *Cross-Border Shootings*. "So long as *Moreno* is on the books, the Ninth Circuit can't avoid the merits question merely by holding that [the agent] is entitled to qualified immunity," as the Fifth Circuit did. *Id.* Instead, it will have no choice but to deny the agent immunity if he violated the Constitution—in square conflict with the Fifth Circuit's holding below. This court should resolve that conflict now and bring the Fifth Circuit into harmony with the Ninth Circuit.

Nor does the Fifth Circuit's holding comport with the approach of other circuits. Like the Ninth Circuit, the Seventh and Eleventh Circuits reject the use of "hindsight to judge the acts of police officers" and instead "look at what they knew (or reasonably should

have known) at the time of the act"; information "unknown to the officer at the time" does not factor into the analysis. *Rodriguez v. Farrell*, 280 F.3d 1341, 1353 (11th Cir. 2002). That rule has been applied to ensure that officers deserving immunity are not subjected to trial based on facts beyond their ken. Reasonable force, for example, "does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time." *Id.* This rule, the Eleventh Circuit has explained, ensures that qualified immunity does not turn entirely on "the fortuity of the circumstances." *Lee*, 284 F.3d at 1200. The Seventh Circuit follows the same rule, emphasizing that the only relevant "information" is that which the officer "possessed at the time the incident occurred." *McDonald by McDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir. 1992).

B. The Fifth Circuit's decision does more than create conflict among the circuits; it also misconstrues this Court's qualified-immunity cases.

This Court has long emphasized that qualified immunity "provide[s] no license to lawless conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). To the contrary, the doctrine "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231. To carry out these dual aims, this Court has devised a two-part test, which lower courts may answer in either order: Do the facts "make out a violation of a constitutional right"? *Id.* at 232. If so, is the officer nevertheless entitled to qualified immunity because he was not "on notice," at the time of the incident, that his conduct was unlawful? *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

The Fifth Circuit's decision misapprehends this test and in doing so severely undermines its purpose. As this Court has explained, the "relevant question" for qualified immunity is "whether a reasonable officer could have believed [the conduct] to be lawful, in light of clearly established law and the information the . . . officers possessed" at the time. *Creighton*, 483 U.S. at 641. Under that approach, "an officer enjoys qualified immunity and is not liable for excessive force unless he has violated a 'clearly established' right, such that 'it would [have been] clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*'" *Kinglsey v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015) (emphasis added)). By focusing on the information the officer possessed at the time, this inquiry mirrors the Court's approach to the excessive-force question on the merits, which looks at "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," *Graham*, 490 U.S. at 396, and considers only "the facts available to the officer at the moment" of the alleged violation, *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990). Yet the Fifth Circuit did not follow this approach. It did not ask whether Mesa violated clearly established law based on what he knew (or reasonably should have known) in the situation he confronted, but instead used hindsight and asked whether he violated clearly established law based on what the facts *later turned out to be*.

The consequences of that novel approach are intolerable. Under the Fifth Circuit's new "hindsight" rule, which now operates in Texas, Louisiana, and Mississippi, competent officers will be subjected to suit based on after-the-fact discoveries about which they could not have known at the time, even if the officers otherwise acted reasonably. Just as unpalatable, officers like Mesa will be allowed to escape liability even if they are "plainly incompetent," *Malley v. Briggs*, 475 U.S. 335, 341 (1986),

or exhibit "obvious cruelty," *Pelzer*, 536 U.S. at 745—"simply because the fortuity of the circumstances" end up creating some uncertainty about which the officer could not have known at the time, *Lee*, 284 F.3d at 1200. That makes no sense. The correct rule—the one adopted by the Ninth Circuit in *Moreno*, and the one that is faithful to this Court's qualified-immunity jurisprudence—avoids these outcomes. By doing so, it advances (rather than undermines) the two competing interests at the heart of the doctrine.

Had the Fifth Circuit applied the correct rule here, it would not have granted Mesa qualified immunity. Mesa does not argue that a reasonable officer in his shoes would have believed that deadly force was necessary in the situation that he faced. *See Graham*, 490 U.S. at 397. Rather, he argues that his conduct, even if "far beyond the hazy border between excessive and acceptable force," should be immunized because, as fortune would have it, Sergio happened to be a Mexican citizen with no voluntary connections to the U.S., who was standing just across the border when he was killed. *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997).

But no reasonable officer would have known those facts at the time. Roughly one million U.S. citizens live in Mexico, including more than 500,000 children, many of whom were born in American border cities like El Paso, but whose families are Mexican and reside across the border in Mexico. *See* U.S. State Department, *U.S. Relations With Mexico: Fact Sheet* (Sept. 2014), http://1.usa.gov/1cogco2; Adriana Gomez, *U.S.-born kids lose basic rights in Mexico*, Associated Press, July 18, 2012, http://bit.ly/1JhJNzq. Sergio could have been one of those children, playing with his friends on a summer day, and Mesa would not have known. Nor is it clear that Mesa knew that Sergio happened to be just across the borderline running through the culvert at that particular

location, rather than just inside it. And if either fact had turned out to be different, Mesa would not be entitled to qualified immunity.

But even if a reasonable officer would have known these facts, or could have made a reasonable guess that Sergio was a Mexican citizen standing on Mexican soil at the time, there is no way the officer could have known, ex ante, the extent of Sergio's voluntary connections with the U.S., and whether they were significant. So why should Mesa be permitted to rely on that later-discovered fact for qualified-immunity purposes—particularly when he was not trained to take these facts into account when deciding whether to use lethal force?

Indeed, Border Patrol agents are required by law to focus on objective risk factors in determining whether to use lethal force—not the citizenship of the subject, whether they have significant connections to the U.S., or whether they happen to be on one side of the border as opposed to the other. *See* 8 C.F.R. §§ 287.8(a)(1)(iii) & (2). These regulations are "[r]elevant to the question" whether Mesa had "fair warning" of the "wrongful character of [his] conduct," regardless of whether they were treated by Border Patrol agents as "merely a sham" they "could ignore . . . with impunity." *Pelzer*, 536 U.S. at 743-44.

Finally, granting qualified immunity is especially inappropriate here, in a case involving an unjustified extrajudicial killing. "One of the less controversial aspects of the due process clause is its implicit prohibition against a public officer's intentionally killing a person, or seriously impairing the person's health, without any justification." *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 848 (7th Cir. 1990) (Posner, J.). In such cases, where the wrongfulness of the conduct is "obvious," *Pelzer*, 536 U.S. at 745, it would turn the doctrine on its head to grant the

officer qualified immunity based on later discoveries about citizenship, voluntary connections, and precise physical location. *See Lee*, 284 F.3d at 1199-1200 (declining to grant immunity based on later developments where "the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits"). And if Agent Mesa thinks otherwise—if his defense is that it wasn't clear that *any* law prevented an unjustified, extrajudicial killing at the border—then that is all the more reason for this Court to grant certiorari on the first question presented as well as the second.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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July 23, 2015

APPENDIX

APPENDIX

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APPENDIX A

United States Court of Appeals,
Fifth Circuit

Nos. 11–50792, 12–50217, 12–50301

Jesus C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; Maria Guadalupe Guereca Bentacour, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca,
Plaintiffs–Appellants,

v.

UNITED STATES of America; United States Department of Homeland Security; United States Bureau of Customs and Border Protection; United States Border Patrol; United States Immigration and Customs Enforcement Agency; United States Department of Justice,
Defendants–Appellees.

Jesus C. Hernandez, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; Maria Guadalupe Guereca

Bentacour, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez,
Plaintiffs–Appellants,

v.

Jesus Mesa, Jr.,
Defendant–Appellee.

Jesus C. Hernandez, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; Maria Guadalupe Guereca Bentacour, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez,
Plaintiffs–Appellants,

v.

Ramiro Cordero; Victor M. Manjarrez, Jr.,
Defendants–Appellees.

April 24, 2015

Appeals from the United States District Court for the Western District of Texas

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Before STEWART, Chief Judge, and JOLLY, DAVIS, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES,

HIGGINSON, and COSTA, Circuit Judges.*

PER CURIAM:

We rehear this matter en banc, *see Hernandez v. United States*, 771 F.3d 818 (5th Cir. 2014) (per curiam) (on petitions for rehearing en banc), to resolve whether, under facts unique to this or any other circuit, the individual defendants in these consolidated appeals are entitled to qualified immunity. Unanimously concluding that the plaintiffs fail to allege a violation of the Fourth Amendment, and that the Fifth Amendment right asserted by the plaintiffs was not clearly established at the time of the complained-of incident, we affirm the judgment of dismissal.

The facts and course of proceedings are accurately set forth in the panel majority opinion of Judge Prado, *Hernandez v. United States*, 757 F.3d 249, 255–57 (5th Cir. 2014). We conclude that the panel opinion rightly

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* Judge DeMoss was a member of the panel and, as a senior judge, elected to participate in the en banc proceedings pursuant to 28 U.S.C. § 46(c) and 5th Circuit Rule 35.6. Although Judge DeMoss participated in the oral argument and the court's deliberations, he subsequently retired from the court, effective April 16, 2015. Before retiring, Judge DeMoss authored the following special concurrence, which would have been issued if he were still a member of the court:

HAROLD R. DeMOSS, JR., Circuit Judge, concurring in part and concurring in the judgment:

I concur in the en banc court's reinstatement of Parts I, II, and VI of the panel's opinion. Furthermore, I concur in the en banc court's assessment that *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), precludes a Fourth Amendment claim on the facts of this case. As to the Fifth Amendment claim, I concur in the judgment of the en banc court for the reasons stated in my dissent from the panel opinion. *See Hernandez v. United States*, 757 F.3d 249, 281–82 (5th Cir. 2014) (DeMoss, J., concurring in part and dissenting in part).

affirms the dismissal of Hernandez's claims against the United States, *id.* at 257–59, and against Agent Mesa's supervisors, *id.* at 280, and we therefore REINSTATE Parts I, II, and VI of that opinion. We additionally hold that pursuant to *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), Hernandez, a Mexican citizen who had no "significant voluntary connection" to the United States, *id.* at 271, and who was on Mexican soil at the time he was shot, cannot assert a claim under the Fourth Amendment.

The remaining issue for the en banc court is properly described as whether "the Fifth Amendment ... protect[s] a non-citizen with no connections to the United States who suffered an injury in Mexico where the United States has no formal control or de facto sovereignty." *Id.* at 281–82 (DeMoss, J., concurring in part and dissenting in part). To underscore the seriousness of the tragic incident under review, we elaborate on that description only to note that the injury was the death of a teenaged Mexican national from a gunshot fired by a Border Patrol agent standing on U.S. soil.

To decide the assertion of qualified immunity made by defendant Agent Mesa, regarding the plaintiffs' Fifth Amendment claim, the court avails itself of the latitude afforded by *Pearson v. Callahan:* "The judges of the ... courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. 223, 236 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

The prongs referred to are familiar: "First, a court must decide whether the facts ... alleged ... make out a violation of a constitutional right.... Second, if [so], the

court must decide whether the right at issue was 'clearly established' at the time of [the] alleged misconduct." *Id.* at 232. "Qualified immunity is applicable unless [both prongs are satisfied]." *Id.*

The panel opinion correctly describes the substantive-due-process claim as "that Agent Mesa showed callous disregard for Hernandez's Fifth Amendment rights by using excessive, deadly force when Hernandez was unarmed and presented no threat." *Hernandez*, 757 F.3d at 267. The question is whether, under the unique facts and circumstances presented here, that right was "clearly established."

The Supreme Court has carefully admonished that we are "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). To the contrary, a right is clearly established only where "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 202) (internal quotation marks omitted). The question here is whether the general prohibition of excessive force applies where the person injured by a U.S. official standing on U.S. soil is an alien who had no significant voluntary connection to, and was not in, the United States when the incident occurred. No case law in 2010, when this episode occurred, reasonably warned Agent Mesa that his conduct violated the Fifth Amendment.

Although the en banc court is somewhat divided on the question of whether Agent Mesa's conduct violated the Fifth Amendment, the court, with the benefit of further consideration and en banc supplemental briefing and oral argument, is unanimous in concluding that any properly asserted right was not clearly established to the extent the law requires. The strongest authority for the

plaintiffs may be *Boumediene v. Bush*, which addressed whether the Suspension Clause of the U.S. Constitution applied to aliens detained outside the United States at the U.S. Naval Base in Guantanamo Bay, Cuba. 553 U.S. 723, 732–33 (2008). Although the Court drew on cases from contexts other than habeas corpus, *see id.* at 755–64 (discussing the Court's precedents on "the Constitution's extraterritorial application," including, *inter alia*, the *Insular Cases*, *In re Ross*, 140 U.S. 453 (1891), *Reid v. Covert*, 354 U.S. 1 (1957), and *Verdugo–Urquidez*, 494 U.S. 259), it expressly limited its holding to the facts before it, *see id.* at 795 ("Our decision today holds only that petitioners before us are entitled to seek the writ; that the [Detainee Treatment Act] review procedures are an inadequate substitute for habeas corpus; and that petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court."). Accordingly, nothing in that opinion presages, with the directness that the "clearly established" standard requires, whether the Court would extend the territorial reach of a different constitutional provision—the Fifth Amendment—and would do so where the injury occurs not on land long controlled by the United States, but on soil that is indisputably foreign and beyond the United States' territorial sovereignty. By deciding this case on a ground on which the court is in consensus, we bypass that issue by giving allegiance to "the general rule of constitutional avoidance." *Callahan*, 555 U.S. at 241.

"There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." *Id.* at 237. Reasonable minds can differ on whether *Boumediene* may someday be explicitly extended as the plaintiffs urge. That is the chore of the first prong of the qualified-immunity test, which we do not address.

The alleged right at issue was not clearly established, under these facts, in 2010.

The judgment of dismissal is AFFIRMED.

EDITH H. JONES, Circuit Judge, joined by SMITH, CLEMENT, and OWEN, Circuit Judges, concurring:

The court has unfortunately taken the path of least resistance. We hold unanimously that Agent Mesa has qualified immunity from this suit for a Fifth Amendment substantive due process violation because he did not violate any clearly established rights flowing from that Amendment. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 818 (2009). This compromise simply delays the day of reckoning until another appellate panel revisits non-citizen tort claims for excessive force resting on extraterritorial application of the United States Constitution. Ongoing incursions across our national borders and our nation's applications of force abroad ensure that other lawsuits will be pursued. We should discourage this litigation before it takes root.

Because it is clear that United States constitutional rights do not extend to aliens who (a) lack any connection to the United States and (b) are injured on foreign soil, I would also resolve this appeal on the first prong of qualified immunity analysis. *See id.* at 236, 129 S. Ct. at 818 ("In some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all.").[1]

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[1] The en banc court did not consider whether, even if a constitutional claim had been stated, a tort remedy should be

Whether a constitutional violation occurred here is a straightforward inquiry with a definite answer. First, if the plaintiffs have a constitutional claim at all, it arises under the Fourth Amendment, not the Fifth. *See Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 1870–71 (1989). This en banc court re-confirms, however, that the Fourth Amendment protects only aliens with "significant voluntary connection[s]" to this country. *United States v. Verdugo–Urquidez*, 494 U.S. 259, 271, 110 S. Ct. 1056, 1064 (1990). Because Hernandez had no such prior connections, the Fourth Amendment claim fails.

Additionally, substantive due process under the Fifth Amendment does not offer a fallback claim here, not least because of the expressly limited reach of the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008). Judge DeMoss's dissent from the panel opinion aptly expressed incredulity about extraterritorial application of the Fifth Amendment:

> If the fact that the United States exerts and has exerted powerful influence over northern Mexico, justifies application of the Fifth Amendment in a strip along the border, how wide is that strip? Is the Fifth Amendment applicable in all of Ciudad Juarez or even the entire state of Chihuahua? Ultimately, the majority's approach devolves into a line drawing game which is entirely unnecessary because there is a border between the United States and Mexico.

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crafted under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Our en banc opinion neither assumes nor decides that question.

Hernandez v. United States, 757 F.3d 249, 281 (5th Cir. 2014) (DeMoss, J., concurring in part and dissenting in part) (internal quotation marks and citation omitted).

I also feel obliged to comment on the plaintiffs' Alien Tort Statute ("ATS") claim against the United States, which has been rejected by the panel, by the unanimous compromise en banc opinion, and indeed by every other circuit court of appeals.[2] A concurring opinion here arguably supports the assertion of nebulous claims for violations of "*jus cogens* " and blithely suggests that the United States' sovereign immunity may be ineffective in American courts against such claims. Among the many troubling implications of the separate opinion, it turns on its head the Supreme Court's obvious reluctance to expand federal judges' authority to import customary international law theories into domestic tort law without careful articulation and severe limitations or Congressional action. *See Sosa v. Alvarez–Machain*, 542 U.S. 692, 732, 124 S. Ct. 2739, 2765–66 (2004) (plaintiff's claim for "arbitrary arrest and detention" failed to state a violation of the law of nations with requisite "definite content and acceptance among civilized nations"); *Kiobel v. Royal Dutch Petroleum Co.*, ___ U.S. ___, 133 S. Ct. 1659, 1669 (2013) (presumption against extraterritoriality applies to Alien Tort Statute).

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[2] *See Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994) (rejecting the argument that *jus cogens* violations implicitly waive sovereign immunity under the Foreign Sovereign Immunities Act); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718–19 (9th Cir. 1992) (same); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968–69 (4th Cir. 1992) (rejecting plaintiffs' argument that the ATS waived the United States' sovereign immunity); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) (holding that "[t]he Alien Tort Statute itself is not a waiver of sovereign immunity").

I. The Fourth Amendment, not the Fifth, Controls

The plaintiffs characterized their claims as arising under either the Fifth or the Fourth Amendment. But on these facts, they can only have a Fourth Amendment claim. Constitutional rights are not interchangeable. When a litigant asserts multiple constitutional claims arising from the same conduct, we must "identify[ ] the specific constitutional right allegedly infringed...." *Graham*, 490 U.S. at 394, 109 S. Ct. at 1870. If it becomes apparent that "a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.' " *Albright v. Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 813 (1994) (quoting *Graham*, 490 U.S. at 395, 109 S. Ct. at 1871) (internal quotation marks and footnote omitted). In essence, the specific trumps the general. This is especially true when a plaintiff brings both Fourth and Fifth Amendment claims asserting law enforcement misconduct. The Court has emphatically stated that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395, 109 S. Ct. at 1871 (emphasis in original). Accordingly, substantive due process analysis is appropriate only if the plaintiffs' claim is not "covered by" the Fourth Amendment. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843, 118 S. Ct. 1708, 1715 (1998)

(applying substantive due process where the passenger of a motorcyclist being pursued by police was killed).[3]

Agent Mesa undoubtedly seized Hernandez. A seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596–97, 109 S. Ct. 1378, 1381 (1989) (emphasis omitted). Law enforcement shootings are also covered by the Fourth Amendment because "there can be no question that apprehension by the use of deadly force is a seizure [.]" *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 1699 (1985). The plaintiffs' complaint alleges that Agent Mesa intentionally shot and killed Hernandez, thus terminating his "freedom of movement through means intentionally applied." *Brower*, 489 U.S. at 596–97, 109 S. Ct. at 1381. Under governing law, if the plaintiffs have any claim at all, it arises from the Fourth, not the Fifth Amendment.

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[3] The plaintiffs argue that *Graham* is inapplicable here because its rule only applies to "free citizens." *Graham* does say all "seizure [s] of [ ] free citizen[s] should be analyzed under the Fourth Amendment...." 490 U.S. at 395, 109 S. Ct. at 1871. But the Court could not have intended to give non-citizens the ability to pursue claims under the more nebulous "substantive due process" standard, while limiting American citizens to the Fourth Amendment's reasonableness test. Nothing in *Graham* (other than the above quoted language) supports such an inference. Taken in context, *Graham* 's reference to "free citizens" was intended to distinguish the scope of protection for "free citizens" from the rights accorded pretrial detainees (under the Fourteenth Amendment) and criminal convicts (under the Eighth Amendment). *See Lewis*, 523 U.S. at 843, 118 S. Ct. at 1715.

II. The Non–Extraterritoriality of the Fourth Amendment

Although the Fourth Amendment "covers" the plaintiffs' claim, Hernandez did not automatically enjoy its protection. The Constitution does not protect all people in all places. *Reid v. Covert*, 354 U.S. 1, 74, 77 S. Ct. 1222, 1260 (1957) (Harlan, J., concurring) ("[T]here are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."). This en banc court recognizes that the Supreme Court has foreclosed extraterritorial application of the Fourth Amendment to aliens where the violation occurs on foreign soil and the alien plaintiff lacks any prior substantial connection to the United States. *Verdugo–Urquidez*, 494 U.S. at 261, 110 S. Ct. at 1059.

Chief Justice Rehnquist wrote in *Verdugo–Urquidez* that the Fourth Amendment's text refers to the right of "the people" to be free from unreasonable searches. "The people," in turn, "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo–Urquidez*, 494 U.S. at 265, 110 S. Ct. at 1061. Turning to the Amendment's history, the Court explained that "[t]he driving force behind the adoption of the Amendment ... was widespread hostility among the former colonists to the issuance of writs of assistance[.]" *Id.* at 266, 110 S. Ct. at 1061. The Amendment's purpose, "was to protect the people of the United States against arbitrary action by their own Government[.]" *Id.* In other words, the Fourth Amendment "restrict[s] searches and seizures which might be conducted by the United States in domestic matters." *Id.* Contemporary historical understanding, the Court continued, confirmed this reading. *Id.* at 267, 110 S. Ct. at 1061–62. As a result, the

Court held, "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Id.* at 271, 110 S. Ct. at 1064.

Despite this seemingly clear pronouncement, critics, including the plaintiffs, claim that the substantial connections test is not—and never was—the law. Because Justice Kennedy concurred and his opinion allegedly differs from the purported majority, the skeptics argue, only four justices concurred in Chief Justice Rehnquist's opinion and it is nonbinding. Even if that were not the case, the skeptics continue, *Verdugo-Urquidez* 's substantial connections test was replaced by the majority opinion in *Boumediene*. This court disagrees.

Foremost, Justice Kennedy joined the majority in full, not just in judgment. Supreme Court justices know the difference between the types of joinder. Justice Kennedy began his concurrence by stating: "Although some explanation of my views is appropriate given the difficulties of this case, *I do not believe they depart in fundamental respects from the opinion of the Court, which I join.*" *Verdugo-Urquidez*, 494 U.S. at 275, 110 S. Ct. at 1066 (Kennedy, J., concurring) (emphasis added). If we take Justice Kennedy at his word—as we must—he undoubtedly joined the majority opinion, and the substantial connections test controls.

In any event, the substance of his concurrence does not undermine the substantial connections test—his opinion reinforces it. Concededly, Justice Kennedy did not rely on the Fourth Amendment's reference to "the people"; in his view, "[t]he force of the Constitution is not confined because it was brought into being by certain

persons who gave their immediate assent to its terms."[4] *Id.* at 276, 110 S. Ct. at 1067. Instead, the Constitution's application abroad "depend[s] ... on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of 'the people.' " *Id.*, 110 S. Ct. at 1067. Applying such general interpretive principles, Justice Kennedy noted the Court's historic reliance on the distinction between citizens and aliens in determining the Constitution's reach. *Id.* at 275, 110 S. Ct. at 1066. "The distinction between citizens and aliens," he explained, "follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." *Id.*, 110 S. Ct. at 1066. This traditional distinction, Justice Kennedy noted, runs through the Court's cases. *Id.*, 110 S. Ct. at 1066.

For Justice Kennedy, the practical consequences of applying the Fourth Amendment extraterritorially also supports the Court's test. "The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness

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[4] This statement has led at least one court to refer to Justice Rehnquist's *reasoning*, specifically his reliance on the Fourth Amendment's text, as only adopted by a plurality. *See Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir.1991) (explaining that "[t]o a plurality of the Court, the use of the phrase 'the people' suggested that the Framers of the Constitution intended the amendment to apply only to those persons who were part of or substantially connected to the national community"). But it does not throw Chief Justice Rehnquist's *holding*, that only aliens with a substantial connection to the United States have constitutional rights, into doubt. *See Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 996 (9th Cir. 2012).

and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment ... should not apply [abroad]." *Verdugo–Urquidez*, 494 U.S. at 278, 110 S. Ct. at 1068 (Kennedy, J., concurring). "For this reason, in addition to the other persuasive justifications stated by the Court," Justice Kennedy "agree[d] that no violation of the Fourth Amendment [ ] occurred [.]" *Id.*, 110 S. Ct. at 1068. Justice Kennedy's concurrence reinforces rather than undermines Chief Justice Rehnquist's majority opinion.[5]

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[5] Since the Court decided *Verdugo–Urquidez*, courts have applied the substantial connections test. *See Ibrahim*, 669 F.3d at 997 (applying the significant voluntary connection test to an alien's First and Fifth Amendment claims); *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (explaining that the "[D]ue [P]rocess [C]lause does not apply to aliens without property or presence in the sovereign territory of the United States"), *vacated and remanded*, 559 U.S. 131 (2010), *reinstated in relevant part*, 605 F.3d 1046 (D.C. Cir. 2010); *United States v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir. 2009) (holding that the Fourth Amendment does not protect a Bahamian citizen with no substantial connections to the U.S.); *Atamirzayeva v. United States*, 524 F.3d 1320, 1329 (Fed. Cir. 2008) (holding that a foreign citizen with no substantial connections to the U.S. has no claim under the Fifth Amendment's Takings Clause); *United States v. Barona*, 56 F.3d 1087, 1093–94 (9th Cir. 1995) (explaining that "with regard to foreign searches involving aliens with 'no voluntary connection' to the United States, [ ] the Fourth Amendment is simply inapplicable").

III. The Non–Extraterritoriality of the Fifth Amendment[6]

After agreeing that *Verdugo–Urquidez* forecloses the plaintiffs' Fourth Amendment claim, this court should have been quick to conclude that their alternate Fifth Amendment claim is equally thwarted by *Johnson v. Eisentrager*. 339 U.S. 763, 70 S. Ct. 936 (1950). The Supreme Court held in *Johnson*, and has reiterated since then, that as a general matter aliens outside the sovereign territory of the United States are not entitled to Fifth Amendment rights. *Id.* at 782–85, 70 S. Ct. at 945–47. *Verdugo–Urquidez* described *Johnson* as unambiguously "reject[ing] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo–Urquidez*, 494 U.S. at 269, 110 S. Ct. at 1063. *Johnson* was similarly described by the Court in *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S. Ct. 2491, 2500 (2001); *see also Castro v. Cabrera*, 742 F.3d 595, 599 n. 5 (5th Cir. 2014) (noting that *Johnson* "reject[ed] extraterritorial application of the Fifth Amendment"). This court is not at liberty to "underrule" Supreme Court decisions when

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[6] The plaintiffs argue without conviction that because Agent Mesa's conduct occurred solely on U.S. soil, this case does not require extraterritorial application of the Constitution. In both *Verdugo–Urquidez* and *Sosa*, however, the Supreme Court treated the cases as involving extraterritorial violations despite the presence of actions on American soil that preceded the foreign incidents. This case is no different. Indeed, the hoary principle of *lex loci delicti* ("law of the place of injury") historically required the application of the law at the place where the last act causing injury (here, the bullet hitting Hernandez) occurred. *Cf. Sosa*, 542 U.S. at 708–711, 124 S. Ct. at 2752–2754 (interpreting the Federal Tort Claims Act foreign country exception, 28 U.S.C. § 2680(k), to apply where the injury occurred, not where the last act or omission causing injury occurred).

the Court has explicitly failed to overrule its own precedents. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921–22 (1989). Consequently, the plaintiffs' substantive due process claim is barred by these precedents.

The plaintiffs' implicit position is that *Johnson* was *de facto* overruled by *Boumediene*, 553 U.S. 723, 128 S. Ct. 2229, and *Johnson* 's refusal to apply the Fifth Amendment extraterritorially was replaced by the three-part test inaugurated in *Boumediene*.[7] As I have noted, this court squarely rejects the plaintiffs' argument in regard to the Fourth Amendment. The diffidence with regard to the Fifth Amendment must stem from *Boumediene*'s discussion and theoretical reframing of *Johnson*. *See Boumediene*, 553 U.S. at 766, 128 S. Ct. at 2259. *Boumediene* and *Johnson* admittedly share the factual similarity that enemy aliens incarcerated outside the continental United States were petitioning for habeas corpus review of their incarceration by the United States military. From the standpoint of this inferior court, however, reading tea leaves as to how far the Supreme Court plans ultimately to press extraterritorial application of constitutional provisions is a useless exercise. Until the Court overrules *Johnson*, we remain bound by its holding.

To be more precise, *Boumediene* was expressly limited to holding that the Suspension Clause, art. I, § 9, cl. 2 of the Constitution, applies to enemy combatants detained in the Guantanamo Bay, Cuba, military facility.

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[7] That test requires courts to examine "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Boumediene*, 553 U.S. at 766, 128 S. Ct. at 2259.

Boumediene, 553 U.S. at 771, 128 S. Ct. at 2262. The significance of both the "Great Writ" and the United States' plenary control at Guantanamo was equally critical to the Court's holding. The Court stated: "In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause," and cited *Blackstone*, who called it the "bulwark of our liberties." *Id.* at 739, 742, 128 S. Ct. at 2244, 2246 (citing 1 W. Blackstone, Commentaries *137). The Court also held that the concerns regarding separation of powers "have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers." *Id.* at 765, 128 S. Ct. at 2259. With respect to the unique circumstances at Guantanamo, the Court variously stated that the Government has "total military and civil control"; "complete jurisdiction and control"; "*de facto* sovereignty"; and had "complete and uninterrupted control of the bay for over 100 years." *Id.* at 747, 755, & 764, 128 S. Ct. at 2248, 2253, & 2258.

Boumediene fashioned a test that it claimed to derive from past decisions that considered the extraterritorial reach of other constitutional provisions. *See Boumediene*, 553 U.S. at 760, 128 S. Ct. at 2256 (citing *In re Ross*, 140 U.S. 453, 11 S. Ct. 897 (1891) (Fifth and Sixth Amendments)); *id.* at 762, 128 S. Ct. at 2257 (citing *Johnson*, 339 U.S. 763, 70 S. Ct. 936 (Fifth Amendment)); *id.*, 128 S. Ct. at 2257 (citing *Verdugo-Urquidez*, 494 U.S. at 277, 110 S. Ct. at 1067 (Fourth Amendment)). The Court concluded that *de jure* sovereignty does not alone determine the extraterritorial reach of the Constitution; instead, "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764, 128 S. Ct. at 2258. But the Court ultimately held its three-factor test

relevant "in determining the reach *of the Suspension Clause....*" *Id.* at 766, 128 S. Ct. at 2259 (emphasis added). Moreover, the Court disclaimed any intention to overrule the holdings of *Johnson* or *Verdugo–Urquidez*. *Id.* at 795, 128 S. Ct. at 2275.

Given that *Boumediene* applied its three-factor test to a different constitutional provision than those with which we are confronted, and that it did not overrule the controlling precedents, it bears repeating: this court may not step ahead of the Supreme Court to hold *Johnson* (or *Verdugo–Urquidez*) no longer binding. Thus, this is not a case where no "clearly established law" articulates the plaintiffs' rights to extraterritorial application of the Fifth Amendment. Following *Boumediene,* there is no law at all supporting their position, and thus no Fifth Amendment claim exists.[8]

Significantly, the plaintiffs cited no case holding that their Fifth Amendment extraterritoriality claim has any viability. To the contrary, in light of the Court's repeated references to the Suspension Clause, we must assume that the Court "explicitly confined its holding 'only' to the extraterritorial reach of the Suspension Clause and disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause." *Ali v.*

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[8] I need not speculate on whether *Boumediene* 's rationale will ultimately be extended to determine the extraterritorial reach of other constitutional provisions. It is important to note, however, that even a defender of this prediction acknowledges the need for refinements of the three-factor functional test if *Boumediene* is brought to bear on other constitutional provisions. *See* Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L.REV. 259, 287 (2009) ("This nonexclusive [three-factor test] was tailored to the Suspension Clause and its case law, and would presumably need modification to address other rights.").

Rumsfeld, 649 F.3d 762, 771 (D.C. Cir. 2011) (internal citations and quotation marks omitted); *see also Al Bahlul v. United States*, 767 F.3d 1, 33 (D.C. Cir. 2014) (en banc) (Henderson, J., concurring) ("Whether *Boumediene* in fact portends a sea change in the extraterritorial application of the Constitution writ large, we are bound to take the Supreme Court at its word when it limits its holding to the Suspension Clause." (internal citation omitted))[9]; *Igartúa v. United States*, 626 F.3d 592, 600 (1st Cir. 2010) ("[T]he *Boumediene* court was concerned only with the Suspension Clause ... not with ... any other constitutional text.").

For all these reasons, the plaintiffs plainly have no cognizable constitutional claim against Agent Mesa.

IV. The Alien Tort Statute Does not Waive U.S. Sovereign Immunity

The plaintiffs seek damages *from the United States* under the ATS, urging as follows: Congress enacted the ATS to allow aliens to sue for violating "the law of nations." 28 U.S.C. § 1350. The tort alleged in this case is "extrajudicial killing," an alleged violation of *jus cogens* norms of customary international law.[10] Customary

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[9] *Al Bahlul*'s holding is not to the contrary. In *Al Bahlul*, the Government conceded that the Ex Post Facto Clause applies to aliens detained at Guantanamo Bay. 767 F.3d at 18. And the en banc court "assume [d] without deciding that the *Ex Post Facto* Clause applies at Guantanamo." *Id.* (italics in original).

[10] According to the Restatement (Third) of Foreign Relations Law § 702 and cmt. n (1987), a state violates a *jus cogens* norm if it as a matter of policy:

> [P]ractices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e)

international law asserts that by their nature, *jus cogens* violations apply even without a nation's consent (consent being the ordinary prerequisite to rules of customary international law).[11] In cases involving foreign officials sued for *jus cogens* violations of human rights, courts have held that individual immunity from suit does not exist. Finally, although the ATS has been held not to waive foreign states' sovereign immunity, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the plaintiffs assert that "Congress has not enacted a similar comprehensive scheme regulating U.S. sovereign immunity for international law violations prosecuted in our own courts." And by this inaction, Congress has signaled that the United States is amenable to ATS suits.

The concurring opinion here finds this reasoning "logical," concludes that it has some force," and posits:

> [I]f there is a category of torts (violations of the law of nations, for example) that change the ordinary rules of sovereign immunity because these acts cannot be authorized by the sovereign, then a country either would lack any such immunity to waive or would not be

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prolonged arbitrary detention, (f) systematic racial discrimination, [or] (g) a consistent pattern of gross violations of internationally recognized human rights.

[11] Vienna Conv. on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679 (*jus cogens* norm is "peremptory norm" of international law, "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"); *see also* Restatement (Third) of Foreign Relations Law § 102 and cmt. k (1987).

> permitted to substitute for one of its officers.

Post at 142, 142–43, & 141 (Haynes, J., concurring). The concurrence asserts that this question has not been addressed by the panel opinion or the en banc compromise opinion that reinstates the panel decision. The concurrence believes this issue was left "unaddressed" in *Sosa* and suggests the Supreme Court take it up. *Post* at 141, 142–43.

With due respect, the plaintiffs' theory has yet to be adopted by any circuit court of appeals and has been repeatedly rejected, and that is because it has no valid foundation in the American constitutional structure, in the ATS, or in Supreme Court precedent. To effectuate their theory would create a breathtaking expansion of federal court authority, would abrogate federal sovereign immunity contrary to clearly established law, and would have severely adverse consequences for the conduct of American foreign affairs.

Taking the Supreme Court decisions first, *Sosa* did not consider U.S. sovereign immunity for ATS violations because the federal government was sued only under the Federal Tort Claims Act. 542 U.S. at 698, 124 S. Ct. at 2747. The ATS claim was alleged only against Sosa, a Mexican national, individually. *Id.* at 698, 124 S. Ct. at 2747. No issue of American sovereign immunity from ATS claims was presented for the Court to decide or even comment on. The overarching theme of *Sosa*, moreover, is one of caution, not expansion of federal court authority. Inferences that *Sosa* might leave open an implied waiver of sovereign immunity are implausible. First, the Court in *Sosa* held unanimously that the ATS is a strictly jurisdictional statute. *Sosa*, 542 U.S. at 714, 124 S. Ct. at 2755. It does not provide a substantive basis for aliens' general assertions of customary international

law violations. Purely jurisdictional statutes do not waive sovereign immunity. *United States v. Testan*, 424 U.S. 392, 398, 96 S. Ct. 948, 953 (1976). Second, *Sosa* rejected the view that the ATS "ought to cover all [customary international law] claims, so long as they also qualify as torts" and instead gave "domestic legal force to an extremely limited subset of [customary international law] claims ... based on its reading of the specific intent of Congress." *Al-Bihani v. Obama*, 619 F.3d 1, 19 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc) (quoting Ernest A. Young, *Sosa and the Retail Incorporation of International Law*, 120 HARV. L.REV. F.. 28, 29 (2007)). According to *Sosa*, the only claims authorized by the ATS for violations of international law norms are those with no "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732, 124 S. Ct. at 2765. In addition, "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, invariably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." 542 U.S. at 732–33, 124 S. Ct. at 2766 (footnotes omitted). The Court went on to deny Alvarez's claim for arbitrary arrest and detention in violation of an international treaty and the Universal Declaration of Human Rights. 542 U.S. at 738, 124 S. Ct. at 2769.

What does this cautionary opinion imply about federal sovereign immunity? As earlier noted, the Court decided in *Amerada Hess* that the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in federal court," 488 U.S. at 439, 109 S. Ct. at 690. The Court flatly rejected the argument that Congress, by failing explicitly to repeal the ATS when it amended the FSIA, had intended for federal courts to "continue to

exercise jurisdiction over foreign states in suits alleging violations of international law outside the confines of the FSIA." 488 U.S. at 435, 109 S. Ct. at 689. That rejection would have been even more emphatic had the court considered whether the ATS waives the United States' sovereign immunity because, as then-Judge Scalia pointed out, foreign sovereign immunity rests only on international comity, while domestic sovereign immunity originates in the constitutional separation of powers. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 n. 5 (D.C. Cir. 1985). The plaintiffs here err twice in asserting the abrogation of federal sovereign immunity under the ATS.

First, my colleagues' argument in the negative—that Congress silently reserved the defense of sovereign immunity against potential violations of international law in U.S. courts, has it backward about the ATS, just as the Court held with respect to foreign sovereign immunity in *Amerada Hess*. Federal sovereign immunity is the overarching principle, which must be explicitly waived by the federal government.[12] "[T]he United States cannot be sued at all without the consent of Congress." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287, 103 S. Ct. 1811, 1819 (1983). To consent, Congress must unequivocally waive sovereign immunity in statutory text; waiver will not be implied. *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092,

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[12] This is exactly the point my colleagues fail to acknowledge. As they explain, because "Congress does not appear to have acted in the same way [as it did with the FSIA] to define federal court jurisdiction over suits against the United States by foreign nationals under the ATS," the ATS, as interpreted in *Sosa*, can deny the government its immunity. *Post* at 140–41 n. 12. But the United States' immunity from suit in federal courts is the rule, subject to explicit exceptions. Therefore, Congress need not do *anything* to preserve its sovereign immunity.

2096 (1996). As Judge Scalia held in *Sanchez-Espinoza*, "[i]t would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin, by judgments nominally against present or former Executive officers, actions that are, *concededly and as a jurisdictional necessity*, official actions of the United States." 770 F.2d at 207 (emphasis in original).[13]

Second, they mistakenly confuse cases deriving from foreign official immunity, an immunity based on officials' status or conduct (and separate from the sovereign state's own immunity), with the constitutional principle involved in U.S. sovereign immunity. *See, e.g., Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012). No case has ever held the United States government has forfeited its sovereign immunity from suit because of any alleged violation of international law, whether *jus cogens* or otherwise. Nevertheless, they would expose the United States, alone among the nations of the world, to liability in federal courts under the ATS without the protection of sovereign immunity. Contrary to the plaintiffs' assertions, the Supreme Court's circumspect readings of the ATS in *Sosa* and *Kiobel* (rejecting ATS's extraterritorial application) offer no basis for the novel proposition that the ATS impliedly forfeits federal sovereign immunity.

Neither the plaintiffs nor the concurring opinion mentions that every other circuit court asked to hold the United States potentially liable under the ATS has

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[13] He qualified this statement by noting that, "These consequences are tolerated when the officer's action is unauthorized because contrary to statutory or constitutional prescription, but we think that exception can have no application when the basis for jurisdiction [under the ATS] requires action authorized by the sovereign as opposed to private wrongdoing." *Id.* (citation and footnote omitted).

declined the invitation. For example, in *Tobar v. United States*, 639 F.3d 1191 (9th Cir. 2011), Ecuadorian nationals sued the United States under the ATS after the Coast Guard stopped, boarded, and detained their ship. The Ninth Circuit considered a number of statutes that might contain waivers of sovereign immunity, including the ATS. With respect to the ATS, the court held "[t]he Alien Tort Statute has been interpreted as a jurisdiction statute only—it has not been held to imply any waiver of sovereign immunity." *Id.* at 1196 (internal citations and quotation marks omitted). This determination is particularly notable because it post-dates the Supreme Court's decision in *Sosa*.

The Fourth Circuit reached the same conclusion in *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). The plaintiffs there asserted ATS claims against the United States government for property damage that occurred during the U.S. invasion of Panama. Once again, the government asserted its sovereign immunity, and the court agreed, holding that "any party asserting jurisdiction under the Alien Tort Statute must establish, independent of that statute, that the United States has consented to suit." *Id.*

So too for the D.C. Circuit. In *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), Nicaraguan citizens sued the United States for injuries incurred at the hands of the Contras. *Id.* at 205. The federal government asserted its sovereign immunity. Then-Judge Scalia held, in no uncertain terms, that "[t]he Alien Tort Statute itself is not a waiver of sovereign immunity." *Id.* at 207; *see also Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980).

That these plaintiffs assert a violation of a *jus cogens* norm does not—and should not—change the outcome of the sovereign immunity analysis. The plaintiffs argue

that *jus cogens* norms occupy such a high place in international law that their violation abrogates sovereign immunity. Other circuits to address such an argument have rejected it. In *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir.2009), the Second Circuit held that *jus cogens* norms cannot abrogate sovereign immunity when Congress has explicitly granted such immunity in the FSIA. It then broadly asserted that "[a] claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity." *Id.* at 15; *see also Princz*, 26 F.3d at 1174; *Siderman*, 965 F.2d at 718–719; *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242–44 (2d Cir.1996). The same principle should apply to the constitutionally-footed doctrine of federal sovereign immunity. Given the unanimous decisions of the other circuits, there is no justification for a federal court's unilateral abrogation of our government's sovereign immunity under the ATS.

Returning once more to *Sosa*, it becomes clear that the Court, as it rejected Alvarez's broad claim for a violation of "the law of nations," fully realized the potentially untoward consequences of empowering lower courts to adopt a federal common law of international law torts. Not only did the Court limit the scope of such actions, but it also explained the difficulties that would ensue had it adopted Alvarez's facially appealing claim:

> Alvarez cites little authority that a rule so broad has the status of a binding customary norm today. He certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking. His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction

> in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting the actions under Rev. Stat. § 1979, 42 U.S.C. § 1983, and *Bivens* ..., that now provide damages remedies for such violations. It would create an action in federal court for arrests by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest. And all of this assumes that Alvarez could establish that Sosa was acting on behalf of a government when he made the arrest, for otherwise he would need a rule broader still.

542 U.S. at 736–37, 124 S. Ct. at 2768 (footnote omitted).

> Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require.

542 U.S. at 738, 124 S. Ct. at 2769 (footnote omitted).

The parallels between these concerns and those attending a claim for "extrajudicial killing" are obvious. The plaintiffs' advocacy here of a broad rule clearly has implications for both domestic law enforcement and for the use of American lethal force in foreign confrontations. Such alleged violations of *jus cogens* could transform every use of deadly force by a federal officer against an alien into a litigable violation of a peremptory norm of international law, supplanting *Bivens* actions. These claims could also be asserted by aliens against state or local law enforcement officers, supplanting § 1983 actions. Finally, this alleged cause of

action could be asserted directly against the United States, which contravenes federal sovereign immunity and is at odds with the FSIA immunity from suit every foreign nation enjoys in U.S. courts.

The existence of foreign sovereign immunity does not, however, eliminate the international complications of opening American courts to broad and vague claims under the ATS. As in *Sosa*, the plaintiffs' proffered rule "would support a cause of action in federal court for any [alleged extrajudicial killing], anywhere in the world." 542 U.S. at 736, 124 S. Ct. at 2768. Although certain *jus cogens* prohibitions, *e.g.* state-sponsored slavery or genocide, may be self-evidently within the scope of the Supreme Court's reasoning in *Sosa*, "[a]ny credible invocation of a principle against [extrajudicial killing] that the civilized world accepts as binding customary international law requires a factual basis beyond" mere conclusional pleadings. *Sosa*, 542 U.S. at 737, 124 S. Ct. at 2769. That a multiplicity of claims could aggravate relations with foreign nations and thwart the Executive and Legislative branches' discretion in conducting foreign affairs seems obvious and constitutes additional reasons, acknowledged in *Sosa*, for extreme caution in recognizing claims for breach of "the law of nations" actionable via the ATS. 542 U.S. at 727, 124 S. Ct. at 2763.

In sum, the plaintiffs' ATS claim against the United States is without foundation, and the concurring opinion should not be read as improvidently providing them support.

Conclusion

A "Lawless" U.S. Border?

One final point is necessary in response to the plaintiffs' assertion that enforcement of United States borders will become "lawless" if aliens in the position of Hernandez lose access to American civil tort recovery. This court must, of course, assume, based only on the pleadings, that Hernandez was the victim of an unprovoked shooting. The plaintiffs' assertion of official, or officially condoned lawlessness is, however, inaccurate. This tragedy neither should, nor has, escaped review. Numerous federal agencies, including the FBI, the Department of Homeland Security's Office of the Inspector General, the Justice Department's Civil Rights Division, and the United States Attorney's Office, investigated this incident and declined to indict Agent Mesa or grant extradition to Mexico under 18 U.S.C. § 3184. There were other possible avenues for evaluation of Agent Mesa's conduct. Plaintiffs could have sought federal court review of the Attorney General's scope of employment certification under the Westfall Act. *See Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 420, 115 S. Ct. 2227, 2229 (1995); *see also Osborn v. Haley,* 549 U.S. 225, 229–30, 127 S. Ct. 881, 887–88 (2007). Further, state systems may superintend excesses of federal executive authority. *See* 28 U.S.C. § 2679(d)(3). A judicially implied tort remedy under *Bivens* for constitutional violations or the Alien Tort Statute is not and was not the plaintiffs' only source of review for this tragedy.

I respectfully concur in the en banc opinion.

JAMES L. DENNIS, Circuit Judge, concurring in part and concurring in the judgment:

I join the en banc court's opinion in its entirety except as to its reason for denying Appellants' Fourth Amendment claim, with which I agree in result. I also join the concurring opinion of Judge Prado, except to the extent that it adopts the en banc court's reason for denying this claim. In *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), the Supreme Court apparently ruled that the phrase "the people" in the Fourth Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this community to be considered part of that community." *Id.* at 265. I am inclined to agree, however, with those who have suggested that the *Verdugo–Urquidez* view cannot be squared with the Court's later holding in *Boumediene v. Bush*, 553 U.S. 723 (2008), that "questions of extraterritoriality turn on objective factors, and practical concerns, not formalism." *Id.* at 764; *see* WAYNE R. LAFAVE ET AL., 2 CRIM. PROC. § 3.1(i) n. 237.1 (3d ed.2014) (citing Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L.REV. 259, 259, 272 (2008); Ellen S. Podgor, *Welcome to the Other Side of the Railroad Tracks: A Meaningless Exclusionary Rule*, 16 SW. J. INT'L L. 299, 310 (2010)); Baher Azmy, *Executive Detention*, Boumediene, *and the New Common Law of Habeas*, 95 IOWA L.REV. 445, 465 (2010); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L.REV. 973, 1044 (2009); Timothy Zick, *Territoriality and the First Amendment: Free Speech*

at—and Beyond—Our Borders, 85 NOTRE DAME L.REV. 1543, 1614 (2010).

The Mexican government has indicated that our adjudication of the Appellants' claims, whether under the Fourth or Fifth Amendment, in this particular case would not cause any friction with its sovereign interests. However, it appears that our judicial entanglement with extraterritorial Fourth Amendment excessive-force claims would be likely to involve impracticable and anomalous factors. For these reasons, I agree with the opinion of the court in declining to apply the Fourth Amendment to adjudicate the Appellants' claims but I do so out of concern for pragmatic and political questions rather than on a formal classification of the litigants involved.

EDWARD C. PRADO, Circuit Judge, concurring:

I agree with the en banc court's holding that the constitutional rights asserted by 15–year–old Sergio Hernández and his family were not clearly established in 2010, when Agent Mesa fired his fatal shots across the international border. However, I am compelled to write separately in response to Judge Jones's concurring opinion, which, in my view, sets forth an oversimplified and flawed analysis of the Fifth Amendment and the Supreme Court's extraterritoriality precedents. In her concurrence, Judge Jones offers an interpretation of the Fifth Amendment implications of *Graham v. Connor*, 490 U.S. 386 (1989), that is contrary to Supreme Court precedent and is certain to sow confusion in our circuit. Further, the concurrence rests on a reading of the Court's pivotal extraterritoriality rulings in *Johnson v. Eisentrager*, 339 U.S. 763, *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), and *Boumediene v. Bush*,

553 U.S. 723 (2008), that sacrifices nuance for an unwarranted sense of certainty.

The facts in this case—though novel—are recurring, and similar lawsuits have begun percolating in the federal courts along the border.[1] Ultimately, it will be up to the Supreme Court to decide whether its broad statements in *Boumediene* apply to our border with Mexico and to provide clarity to law enforcement, civilians, and the federal courts tasked with interpreting the Court's seminal opinions on the extraterritorial reach of constitutional rights. Because the law is currently unclear, I join the en banc court's opinion in full and write separately only to respond to Judge Jones's concurring opinion.

I. The Applicability of the Fifth Amendment

The notion that the Fourth Amendment provides the exclusive means of relief for Hernández is rooted in a strained and incorrect reading of *Graham v. Connor*. The Court in *Graham* held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." 490 U.S. at 395. The Court explained that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.*

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[1] *See, e.g., Rodriguez v. Unknown Parties*, No. 4:14-cv-02251, 2014 WL 3734237 (D.Ariz. filed July 29, 2014).

Judge Jones's concurrence rightly points to these portions of the Court's opinion, but it elides key limiting phrases in each: "free citizen" and "explicit textual source." If, as the Court held in *Verdugo–Urquidez*, 494 U.S. at 274–75, the Fourth Amendment does not shield aliens located abroad (*viz.* non-"free citizens"), then it cannot provide "an explicit textual source of constitutional protection" to persons in Hernández's position, and *Graham* 's directive to apply the Fourth Amendment to *covered* excessive-force claims is simply inapt.

Indeed, as the Court explained in *United States v. Lanier*, 520 U.S. 259 (1997), "*Graham* ... does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that *if a constitutional claim is covered* by a specific constitutional provision, ... the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Id.* at 272 n. 7 (emphasis added). Subsequent cases have affirmed this view. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) ("Substantive due process analysis is therefore inappropriate in this case only if respondents' claim is 'covered by' the Fourth Amendment. It is not."); *Petta v. Rivera*, 143 F.3d 895, 901 (5th Cir. 1998) ("[A] plaintiff whose claim is not susceptible to proper analysis with reference to a specific constitutional right may still state a claim under § 1983 for a violation of his or her Fourteenth Amendment substantive due process right, and have the claim judged by the constitutional standard which governs that right.").[2]

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[2] Apparently troubled by the implication that the Court in *Graham* excluded the class of claims at issue here from the

Hernández, a noncitizen, was fatally shot in Mexico by a U.S. government agent standing on U.S. soil. Accepting Hernández's allegations as true, as we must on a motion to dismiss, Agent Mesa made no effort to

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presumptive coverage of the Fourth Amendment, Judge Jones's concurrence imputes a restrictive meaning to the Court's phrase "free citizens." According to the concurrence, the Court could not have intended to permit non-citizens to assert claims for excessive force under the Fourteenth Amendment while limiting citizens to the Fourth Amendment. But this misses the point. Even if, as the concurrence suggests, the Court used this term in *Graham*—a case centering on the use of excessive force during an investigatory stop of a citizen, 490 U.S. at 388–89—to distinguish between the constitutional protections afforded to civilians, pretrial detainees, and incarcerated individuals, this says nothing about whether a claim that falls outside of these set boundaries is "covered by" the Fourth Amendment. Where, as here, a *noncitizen* alleges excessive force *abroad*, and there is no indication that the show of authority was directed at *apprehension*, it cannot be that the claim arises under the Fourth Amendment or not at all.

The cases the concurrence cites are not to the contrary. *Cf. Lewis*, 523 U.S. at 843–44 (holding that the passenger of a vehicle being pursued by police was not "seized" during a fatal collision and therefore could assert a substantive due process claim under the Fourteenth Amendment); *Albright v. Oliver*, 510 U.S. 266, 273–74 (1994) (declining to recognize a substantive due process right to be free from criminal prosecution without probable cause because the Fourth Amendment was drafted to address pretrial deprivations of liberty); *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596–99 (1989) (determining that the fatal use of a roadblock to terminate a suspect's flight constituted a seizure and observing that "a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*."); *Tennessee v. Garner*, 471 U.S. 1, 3, 7 (1985) (analyzing the apprehension of a fleeing suspect through the use of deadly force as a seizure).

apprehend Hernández—he detained one of Hernández's companions, then fired his service weapon into Mexico, where Hernández hid behind the pillar of a bridge, and he ultimately left Hernández's body where it lay. Under *Verdugo-Urquidez* and *Lewis*, the Fourth Amendment does not "cover" this claim of excessive force. I would therefore hold that Hernández may invoke the Fifth Amendment's prohibition on constitutionally arbitrary official conduct.

II. The Extraterritoriality of the Fifth Amendment

Judge Jones's concurrence paints our extraterritoriality case law in broad strokes, with a palette of black and white. The state of the law, as the concurrence views it, permits no gray.[3] According to the concurrence, the Constitution cannot apply

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[3] The absolutism of the concurrence's analytical framework is epitomized by its phrasing of the constitutional issue in this case: "United States constitutional rights do not extend to aliens who (a) lack any connection to the United States and (b) are injured on foreign soil." All nuance is lost, and only one conclusion follows from the question presented. But there is no question that Hernández had *some* connection to the United States, even if not the "significant voluntary connection" required to invoke the protections of the Fourth Amendment under *Verdugo-Urquidez*, 494 U.S. at 271, by virtue of the acts of Agent Mesa that originated in the United States and had their effect in Mexico. Likewise, it is misguided to focus exclusively on Hernández's location within Mexico when the bullets Agent Mesa fired from United States soil found their target. This is not a case involving a drone strike, an act of war on a distant battlefield, or law-enforcement conduct occurring entirely within another nation's territory; it is a fatal shooting by small-arms fire in which the short distance separating those involved was bisected by an international border. These distinct facts cast doubt on the concurrence's simplistic framework and belie its warning that this case implicates "our nation's applications of force abroad."

extraterritorially to the facts of this case because the Supreme Court has held, generally, that the Fourth and Fifth Amendments do not apply to noncitizens with no significant voluntary connection to the United States. Citing *Eisentrager* and *Verdugo-Urquidez*, the concurrence asserts that the Supreme Court has foreclosed the question before our Court. This uncomplicated view of extraterritoriality fails to exhibit due regard for the Court's watershed opinion in *Boumediene*, which not only authoritatively interpreted these earlier cases but also announced the bedrock standards for determining the extraterritorial reach of *the Constitution*—not just the writ of habeas corpus. Applying these standards, I would hold the Fifth Amendment applicable to the particular facts alleged by Hernández.

In *Boumediene*, the Court provided its clearest and most definitive articulation of the principles governing the application of constitutional provisions abroad. Although the Court was tasked with deciding the narrow question of whether aliens designated enemy combatants and detained at Guantanamo Bay had the constitutional privilege of habeas corpus, Justice Kennedy wrote a lengthy opinion for the Court that grappled with the foundations of extraterritoriality. The Court first discussed its sparse extraterritoriality precedents and found them to undermine "the Government's argument that, at least as applied to noncitizens, *the Constitution* necessarily stops where *de jure* sovereignty ends." *Boumediene*, 553 U.S. at 755 (emphasis added). Rather, the Court read beyond the bare holdings of these cases and concluded that they shared a common thread: "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."

Id. at 764.[4] Based on these considerations, the Court identified at least three factors that were relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the quality of the process underlying this finding; (2) the nature of the sites where the apprehension and detention occurred;

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[4] Critically, while explaining its reasoning, the Court repeatedly cited Justice Kennedy's concurring opinion in *Verdugo–Urquidez*, in which he advocated a functional analysis of extraterritoriality. *Boumediene*, 553 U.S. at 759–62. In *Verdugo–Urquidez*, the Court held that the Fourth Amendment had no application to DEA agents' warrantless search of a Mexican citizen's residences in Mexico. 494 U.S. at 262, 274–75. Although he agreed with the Court's ultimate conclusion that no Fourth Amendment violation had occurred, Justice Kennedy wrote separately to express his view that the reach of the Constitution is not confined by the identity of the class of persons that ratified the instrument or by the text used to denominate those subject to its protection (e.g., "the people"). *Id.* at 275–76 (Kennedy, J., concurring). Rather, Justice Kennedy urged a functional approach to extraterritoriality—one that he traced as far back as *In re Ross*, 140 U.S. 453 (1891), the *Insular Cases* (e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901), *Hawaii v. Mankichi*, 190 U.S. 197 (1903), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922)), and *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring). *See id.* at 277–78 ("These [extraterritoriality] authorities ... stand for the proposition that we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad."); *id.* at 278 (analyzing the extraterritorial reach of the Fourth Amendment by determining whether "[t]he conditions and considerations of this case would make adherence to the [Amendment] ... impracticable and anomalous").

The significance of this opinion, which evinces Justice Kennedy's dedication to applying a functional approach to extraterritoriality even in a U.S.-Mexico cross-border law-enforcement context, cannot be understated. And it hardly bears repeating here that Justice Kennedy cast the deciding vote in both *Verdugo–Urquidez* and *Boumediene*.

and (3) the practical obstacles inherent in determining the detainee's entitlement to the writ. *Id.* at 766. After analyzing these factors, the Court held that the Suspension Clause "has full effect at Guantanamo Bay." *Id.* at 771.

This holding may have been limited to the Suspension Clause, but the Court's reasoning was decidedly not so constricted. Justice Kennedy's opinion drew from the analysis of numerous rights in numerous contexts *other than habeas*, *id.* at 755–64, framing its review of the case law as a survey of the Court's discussions of "*the Constitution's* extraterritorial application," *id.* at 755 (emphasis added). More importantly, when the Court rejected the Government's proffered reading of *Eisentrager*—the case that Judge Jones's concurrence cites as facially foreclosing Hernández's Fifth Amendment claim[5]—it announced in

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[5] As *Boumediene* recognized, the ruling in *Eisentrager* cannot reasonably be divorced from its idiosyncratic facts: the extension of Fifth Amendment rights and the writ of habeas corpus to alleged members of the German armed forces who were captured in China, convicted of violating the laws of war, and imprisoned in occupied, post-World War II Germany. *See Boumediene*, 553 U.S. at 762–64. If the enemy combatants at Guantanamo Bay were not sufficiently similar to the petitioners in *Eisentrager* to be bound by that case, then Hernández—an unarmed fifteen-year-old boy with the misfortune of standing on the wrong side of an international border—certainly is not.

Furthermore, while Judge Jones's concurrence is quick to emphasize *Boumediene* 's limited holding, it is conspicuously silent as to the significance of *Eisentrager* 's equally narrow ruling. *See Eisentrager*, 339 U.S. at 785 ("We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."). In any event, my point is not that *Boumediene* overruled *Eisentrager*, but that the 2008 case offers us the Court's authoritative reading of the

no uncertain terms that "[n]othing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of *the Constitution* or of habeas corpus." *Id.* at 764 (emphasis added).[6]

Boumediene, and its functionality-focused reading of the Court's previous extraterritoriality decisions, is instructive here. Confronted with a novel extraterritoriality question, we must apply the only appropriate analytical framework the Court has given us: the *Boumediene* factors. Adapted to the present context, three objective factors and practical concerns are relevant to our extraterritoriality determination: (1) the citizenship and status of the claimant, (2) the nature of the location where the constitutional violation occurred, and (3) the practical obstacles inherent in enforcing the claimed right. *Cf. id.* at 766–71.[7] The

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1950 case—one that eschews a formalistic approach to extraterritoriality. It is *this* interpretation of *Eisentrager*—according to which the case must be understood as consistent with the functional approach endorsed in *Boumediene*—that must guide our analysis.

[6] Even if these statements were mere dicta, we and our fellow circuits have long recognized that the Supreme Court's words carry special weight. *See Schwab v. Crosby*, 451 F.3d 1308, 1325–26 (11th Cir. 2006) (noting that the court has "previously recognized that dicta from the Supreme Court is not something to be lightly cast aside" and citing cases from eleven circuits expressing the deference owed to Supreme Court dicta (citation and internal quotation marks omitted)); *United States v. Becton*, 632 F.2d 1294, 1296 n. 3 (5th Cir. 1980) ("We are not bound by dicta, even of our own court.... Dicta of the Supreme Court are, of course, another matter.").

[7] Judge Jones's concurrence is of course correct that Professor Neuman, "a defender of th[e] prediction" that *Boumediene* may be extended to other constitutional provisions, has acknowledged "the need for refinements of the three-factor functional test." But that is exactly what the panel majority's original opinion suggested, *see*

relevant practical obstacles include the consequences for U.S. actions abroad, the substantive rules that would govern the claim, and the likelihood that a favorable ruling would lead to friction with another country's government. *See id.*; *Verdugo–Urquidez*, 494 U.S. at 273–74; *id.* at 278 (Kennedy, J., concurring). As the panel majority's original opinion explained, the *Boumediene* factors, coupled with an analysis of the operation, text, and history of the Fifth Amendment, militate in favor of the extraterritorial application of substantive due process protections on these facts. *See Hernández v. United States*, 757 F.3d 249, 259–63, 267–72 (5th Cir. 2014), *vacated in part and reinstated in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015).

In sum, were we to reach the constitutional merits, I would hold, as the vacated panel majority's opinion did, *Hernández*, 757 F.3d at 272, that a noncitizen situated immediately beyond our nation's borders may invoke the

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Hernández v. United States, 757 F.3d 249, 262 (5th Cir. 2014), *vacated in part and reinstated in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015), and what federal courts of appeals are uniquely well-equipped to propound—refinements that are faithful to the Court's opinion, which described the factors as non-exclusive and derived them from contexts *in addition to* habeas, *see Boumediene*, 553 U.S. at 766. Moreover, Professor Neuman also reads *Boumediene* as a case with implications beyond habeas corpus, and he has expressed optimism about the expansion of Justice Kennedy's functional approach. *See* Gerald L. Neuman, Essay, *Extraterritoriality and the Interest of the United States in Regulating its Own*, 99 Cornell L.Rev. 1441, 1458, 1470 (2014) (observing that "[a]lthough the holding of *Boumediene* concerned the Suspension Clause, Justice Kennedy described his functional approach as an overall framework derived from precedents involving a variety of constitutional rights," and concluding that "[t]he selective functional approach of *Boumediene v. Bush* should be developed and strengthened to reconcile commitment to constitutional values with the extraterritorial exercise of power").

protection of the Fifth Amendment against the arbitrary use of lethal small-arms force by a U.S. government official standing on U.S. soil. To hold otherwise would enshrine an unsustainably strict, territorial approach to constitutional rights—one the Supreme Court rejected in *Boumediene*.[8]

III. Conclusion

Contrary to Judge Jones's concurrence, I believe that the "path of least resistance" presents a prudent course for the en banc court. The depth of our disagreement about the meaning of *Boumediene*, *Verdugo-Urquidez*, and *Eisentrager* is compelling evidence that the law was not clearly established at the time of the tragic events

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[8] Disturbingly, such a narrow approach could also create zones of lawlessness where the fortuity of one's location at the time of a gunshot would mark the boundary between liability and impunity. This would result, in turn, in perverse and disturbing incentives for government agents confronted with noncitizen migrants near the border. Because directing lethal force *into* Mexico would violate no constitutional norms, a government agent resorting to deadly force would have every reason to fire his weapon *before* the migrant reaches the U.S. border, or *after* the migrant crosses back into Mexico, to avoid possible civil liability. By contrast, if the agent shoots *while* the migrant is in U.S. territory, then the Constitution is suddenly—and undesirably—implicated. And it goes without saying that if the scenario were reversed, and Mexican government agents were firing weapons across the border into the United States, unyielding conceptions of territoriality would likely fall by the wayside.

Judge Jones's concurrence disputes the characterization of the border region as "lawless," citing the governmental investigations into Hernández's fatal shooting. But the fact that the United States "declined to indict Agent Mesa or grant extradition to Mexico" speaks not to the promise of accountability but to the practical obstacles associated with the criminal and political processes that exist to regulate official conduct.

giving rise to this suit. But to affirmatively find no constitutional violation on these facts—which are without parallel in our precedents—requires a troublingly uncomplicated reading of the governing law. Just as *Graham* cannot be understood without *Lanier* and *Lewis*, *Verdugo-Urquidez* and *Eisentrager* cannot be understood without *Boumediene*. Reading these cases in context and with due regard for the novel facts presented here, it is evident that Agent Mesa's fatal cross-border shooting of Sergio Hernández cannot be painted in the simple black and white prevalent in Judge Jones's concurrence. It requires a shade of gray that only a careful engagement with our precedents and the record in this case can produce.

Were we in a position to reach the constitutional merits, I would hold that Agent Mesa's actions violated Hernández's Fifth Amendment right to be free from constitutionally arbitrary government conduct. But until the Supreme Court intervenes to clarify the reach of *Boumediene* and apply Justice Kennedy's functional test to these distinct facts, I remain satisfied that the en banc court has wisely resolved this appeal on clearly-established-law grounds.

I respectfully concur in the en banc opinion.

CATHARINA HAYNES, Circuit Judge, joined by SOUTHWICK and HIGGINSON, Circuit Judges, concurring:

I concur in the judgment of the court.[1] I write separately to address the question of sovereign

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[1] I also concur in the reasoning of the en banc opinion as

immunity for the United States in more detail. As the reinstated panel opinion correctly notes, the Alien Tort Statute ("ATS") is a jurisdictional statute but is not "stillborn." *Hernandez*, 757 F.3d at 258; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004). It provides a forum in United States courts for tort claims by aliens alleging a violation of "the law of nations."[2] 28 U.S.C. § 1350. The panel majority opinion nonetheless determines that Congress must explicitly waive sovereign immunity to make such torts committed in violation of the "law of nations" actionable against the United States (substituted for one of its officers)—as eloquently described in the special concurrence filed by Judge Jones ("Special Concurrence").[3] That may be a fair

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supplemented herein.

[2] The parties and panel majority opinion focus on whether sovereign immunity bars an ATS suit, rather than on whether killing an unarmed civilian without any provocation or just cause would violate the types of international norms contemplated by the ATS in the phrase "law of nations." *See, e.g., Hernandez*, 757 F.3d at 259 (assuming *arguendo* that Plaintiffs averred a violation of the "law of nations" the ATS would recognize by alleging "that the United States violated the international prohibition against 'extrajudicial killings' "). For purposes of this discussion, I will assume that killing a civilian without any provocation or just cause would violate the law of nations, as did the panel majority opinion. *Id.*

[3] Because Mesa's conduct occurred in the United States, I do not view *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), cited by the government here, as barring an action under the ATS. *See id.* at 1669 ("[A]ll the relevant conduct took place outside the United States," such that the ATS did not provide a United States forum for the international tort claimed in that case); *see also id.* at 1670 (Alito, J., concurring) ("[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality ... unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa* 's requirements of definiteness and acceptance among civilized nations.").

understanding of the current state of the law in this area. But I wish to address some undeveloped implications of what the Supreme Court has so far held, above all in its extended treatment of the ATS in *Sosa*.

As the panel majority opinion notes, *Sosa* holds that federal courts can recognize a "limited" number of international common law torts that fall within the rubric of the ATS. *See Sosa*, 542 U.S. at 712. Left unaddressed is the question of whether any such common law torts would make the sovereign immunity of the United States unavailable. Put another way, if the United States *has* sovereign immunity as the Special Concurrence asserts, then I agree that it must be expressly waived in order for a lawsuit such as this one to be viable. But if there is a category of torts (violations of the law of nations, for example) that change the ordinary rules of sovereign immunity because these acts cannot be authorized by the sovereign, then a country either would lack any such immunity to waive or would not be permitted to substitute for one of its officers.

The Fourth Circuit recently discussed this possibility, noting in the context of foreign official immunity:

> Unlike private acts that do not come within the scope of foreign official immunity, *jus cogens* violations may well be committed under color of law and, in that sense, constitute acts performed in the course of the foreign official's employment by the Sovereign. However, as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign.

Yousuf v. Samantar, 699 F.3d 763, 775–76 (4th Cir. 2012) (citing *Siderman de Blake v. Republic of Argentina*,[4] 965 F.2d 699, 718 (9th Cir. 1992) ("International law does not recognize an act that violates *jus cogens* as a sovereign act.")).

In turn, *jus cogens* norms are a form of customary international law, a term often used instead of the phrase "law of nations." *See generally* Gwynne L. Skinner, *Roadblocks to Remedies: Recently Developed Barriers to Relief for Aliens Injured by U.S. Officials, Contrary to the Founders' Intent*, 47 U. RICH. L.REV.. 555, 565 (2013) ("The ATS gives federal courts jurisdiction over tort claims brought by aliens for violations of the law of nations, a term now seen as synonymous with customary

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[4] At issue in *Siderman* was a foreign state's immunity from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.* 965 F.2d at 718–19. The *Siderman* court's discussion of *jus cogens* supports the views expressed in this concurrence; yet, that court ultimately found that it had no jurisdiction over a foreign state (Argentina) because the Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corporation*, 488 U.S. 428, 433 (1989), has interpreted the FSIA as a complete and exclusive scheme governing foreign state immunity in U.S. courts. *See Siderman*, 965 F.2d at 718–19; *see also Amerada Hess*, 488 U.S. at 433–34 (noting the Court "start[ed] from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress in the exact degrees and character which to Congress may seem proper for the public good" and holding that "the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts" (citations and internal quotation marks omitted)). Congress does not appear to have acted in the same way to define federal court jurisdiction over suits against the United States by foreign nationals under the ATS, except through the ATS itself. Therefore, it is imperative to consider *jus cogens* and its impact on the United States's immunity in light of the Court's painstaking interpretation of the ATS in *Sosa* and the common law torts recognized therein.

international law."); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 448 (2002) ("[M]ost courts [interpreting the ATS] seem to have limited the scope of actionable customary international law to fundamental or jus cogens norms...."); Justin D. Cummins, *Invigorating Labor: A Human Rights Approach in the United States*, 19 EMORY INT'L L.REV. 1, 5 n. 12 (2005) ("Jus cogens 'is now widely accepted ... as a principle of customary law (albeit of higher status).' " (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 n. 6)); *cf. Siderman*, 965 F.2d at 715 (noting that *jus cogens* differs from customary international law in that "customary international law derives solely from the consent of states, [while] the fundamental and universal norms constituting *jus cogens* [derive from customary laws considered binding on all nations and] transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II"); *Sanchez–Espinoza v. Reagan*, 770 F.2d 202, 206–07 (D.C. Cir. 1985) (Scalia, Circuit J.) (describing "the law of nations [as] so-called customary international law, arising from the customs and usages of civilized nations" (citation and internal quotation marks omitted)).

Although not all *jus cogens* norms may fall within the category of international common law torts that federal courts can recognize under *Sosa*, it seems logical that cognizable *jus cogens* norms may preclude a sovereign immunity defense. *Cf.* Thomas H. Lee, *The Safe–Conduct Theory of the Alien Tort Statute*, 106 COLUM. L.REV.. 830, 879–82, 890–95, 901–08 (2006) (analyzing history, *Sosa*, and legislative documents from the founding era to postulate about which international common law torts are cognizable under the ATS); Sarah H. Cleveland, *The Kiobel Presumption and*

Extraterritoriality, 52 COLUM. J. TRANSNAT'L L.. 8, 17–19 (2013) (similar, but arguing for a more expansive view of which torts are cognizable, especially in the extraterritorial context); *cf. also The Paquete Habana*, 175 U.S. 677, 700–01 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction...."); *Estate of Amergi ex rel. Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1363–64 (11th Cir. 2010) (describing the type of international tort that federal courts may recognize under the ATS and *Sosa*). Plaintiffs raise this argument—that sovereign immunity may be unavailable for a category of *jus cogens* torts or other violations of the law of nations—but neither the reinstated panel nor the en banc opinion addresses it.

Sosa also did not address sovereign immunity vis-à-vis the ATS. In that case, the Court only considered the claims of a foreign national named Alvarez–Machain that he was kidnapped by another foreign national, Sosa, at the behest of the U.S. Drug Enforcement Administration ("DEA"). 542 U.S. at 698–99. The Court ultimately held that the alleged international norm in question was insufficient to support a claim under the common law underlying the ATS. *Id.* at 712. *Sosa* 's language, however, hints at the idea that the ATS contemplated something broader than merely giving jurisdiction for an action Congress authorizes: "[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress...." *Id.* at 719.

Unlike *Sosa*, here the United States was substituted for Mesa under the Westfall Act. Plaintiffs could have sought (but did not seek) federal-court review of the Attorney General's scope-of-employment certification under the Westfall Act. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995); *see also Osborn v.*

Haley, 549 U.S. 225 (2007). Indeed, given Plaintiffs' argument that *jus cogens* violations are not legitimate official acts, Plaintiffs may have had a strong basis for raising such a challenge.[5] *See, e.g., Yousuf*, 699 F.3d at 776 (distinguishing between status- and conduct-based immunity). Moreover, I note that the Special Concurrence does not take issue with the observation that Plaintiffs chose not to pursue this viable option for challenging Mesa's conduct.

I conclude that Plaintiffs' argument on sovereign immunity and the ATS has some force. But in this area of great delicacy involving international diplomacy and United States sovereign immunity, I believe it is best to leave this issue to the Supreme Court or at least to a court more appropriately positioned to address these intricate issues. *See Sosa*, 542 U.S. at 725 ("[T]here are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind."); *id.* at 728 (similar); *see also id.* at 750 (Scalia, J., concurring in part and concurring in the judgment) (decrying the notion that lower federal courts will be determining "perceived international norms"). Accordingly, I concur in the judgment of the en banc court.

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[5] Thus, Plaintiffs' concern that people in Mesa's situation can commit wrongful acts with impunity is not accurate. A *Bivens* action does not stand alone as Plaintiffs' last resort to seek review of this tragedy. In addition to challenging the substitution by the United States, Plaintiffs may be able to seek redress in Mexican courts or through Mexican diplomatic channels. *See* 18 U.S.C. § 3184. State processes may also be available. *See* 28 U.S.C. § 2679(d)(3). Finally, Congress has exemplars both for establishing a compensation system for victims of United States government overseas torts, *see* 21 U.S.C. § 904, and also for waiving foreign sovereign immunity, *see* 28 U.S.C. § 1605(a).

JAMES E. GRAVES, JR., Circuit Judge, concurring in part:

I agree with the majority that the Fifth Amendment right was not clearly established at the time of the incident. But I also join, in part, the concurring opinion of Judge Prado, except to the extent that it adopts the en banc court's reasons for denying the Fourth Amendment claim. Additionally, I join, in part, Judges Dennis and Haynes in concluding that the plaintiffs' claims under the Fourth Amendment and the Alien Tort Statute (ATS) have force. However, I disagree with the conclusions of Judges Dennis and Haynes that this court should forego the adjudication of such claims.[1] Instead, I would conclude that this court should carefully adjudicate the ATS and Fourth Amendment claims. *See Sosa*, 542 U.S. at 712–13, 724–26; and 28 U.S.C. § 1350. For these reasons, I respectfully concur with the majority opinion in part and join the separate opinions of Judges Dennis, Prado and Haynes in part.

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[1] I also disagree with Judge Haynes' concurrence to the extent that it lists various other forms of review or redress which are, for the most part, unavailable, ineffective, or do not provide the same relief as a *Bivens* action.

APPENDIX B

Date filed: 11/05/2014

United States Court of Appeals,
Fifth Circuit

Nos. 11–50792, 12–50217, 12–50301

Jesus C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; Maria Guadalupe Guereca Bentacour, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca,
Plaintiffs–Appellants,

v.

UNITED STATES of America; United States Department of Homeland Security; United States Bureau of Customs and Border Protection; United States Border Patrol; United States Immigration and Customs Enforcement Agency; United States Department of Justice,
Defendants–Appellees.

Jesus C. Hernandez, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; Maria Guadalupe Guereca Bentacour, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez,
Plaintiffs–Appellants,

v.

Jesus Mesa, Jr.,
Defendant–Appellee.

Jesus C. Hernandez, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; Maria Guadalupe Guereca Bentacour, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez,
Plaintiffs–Appellants,

v.

Ramiro Cordero; Victor M. Manjarrez, Jr.,
Defendants–Appellees.

ON PETITIONS FOR REHEARING EN BANC
(Opinion June 30, 2014, 5 Cir., 2014, 757 F.3d 249)

Before STEWART, Chief Judge, JOLLY, DAVIS, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON and COSTA, Circuit Judges.

BY THE COURT:

A member of the court having requested a poll on the petitions for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C

United States Court of Appeals,
Fifth Circuit

Nos. 11–50792, 12–50217, 12–50301

Jesus C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca; Maria Guadalupe Guereca Bentacour, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian Hernandez Guereca,
Plaintiffs–Appellants,

v.

UNITED STATES of America; United States Department of Homeland Security; United States Bureau of Customs and Border Protection; United States Border Patrol; United States Immigration and Customs Enforcement Agency; United States Department of Justice,
Defendants–Appellees.

Jesus C. Hernandez, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor–in–Interest to the Estate of Sergio Adrian

Hernandez Guereca; Maria Guadalupe Guereca Bentacour, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor-in-Interest to the Estate of Sergio Adrian Hernandez Guereca,

Plaintiffs-Appellants,

v.

Jesus Mesa, Jr.,
Defendant-Appellee.

Jesus C. Hernandez, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor-in-Interest to the Estate of Sergio Adrian Hernandez Guereca; Maria Guadalupe Guereca Bentacour, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor-in-Interest to the Estate of Sergio Adrian Hernandez Guereca,

Plaintiffs-Appellants,

v.

Ramiro Cordero; Victor M. Manjarrez, Jr.,
Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Texas

June 30, 2014

Before DeMOSS, DENNIS, and PRADO, Circuit Judges.

EDWARD C. PRADO, Circuit Judge:

This case involves a foreign national's attempt to invoke constitutional protection for an injury that occurred outside the United States. United States Border Patrol Agent Jesus Mesa, Jr. ("Agent Mesa"), standing in the United States, shot and killed Sergio Adrian Hernandez ("Hernandez") Guereca, a Mexican citizen, standing in Mexico. Hernandez's family sued, asserting a number of claims against the United States, the border patrol agent, and the agent's supervisors. For the following reasons, we AFFIRM the judgments in favor of the United States and the supervisors, but we REVERSE the judgment in favor of the border patrol agent.

I. BACKGROUND

Appellants' complaint sets forth the following factual allegations. On June 7, 2010, Sergio Adrian Hernandez Guereca, a fifteen-year-old Mexican national, was gathered with a group of friends on the Mexican side of a cement culvert that separates the United States and Mexico.[1] Hernandez and his friends were playing a game that involved running up the incline of the culvert, touching the barbed-wire fence separating Mexico and the United States, and then running back down the incline. As they were playing, United States Border Patrol Agent Jesus Mesa, Jr. arrived on the scene and detained one of Hernandez's friends, causing Hernandez to retreat "beneath the pillars of the Paso del Norte

[1] The culvert is located near the Paso del Norte Bridge in El Paso, Texas.

Bridge" in Mexico to observe. Agent Mesa, still standing in the United States, then fired at least two shots at Hernandez, one of which struck him in the face and killed him.

Hernandez's parents, Jesus C. Hernandez and Maria Guadalupe Guereca Bentacour ("the Appellants"), sued, asserting eleven claims against the United States, Agent Mesa, and unknown federal employees. They brought the first seven claims under the Federal Tort Claims Act ("FTCA") based on multiple allegations of tortious conduct.[2] Their next two claims asserted that the United States and the unknown federal employees had violated Hernandez's Fourth and Fifth Amendment rights by knowingly adopting inadequate procedures regarding the use of deadly force and by failing to adopt adequate procedures regarding the use of reasonable force in effecting arrests. Their tenth claim asserted that Agent Mesa was liable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violating Hernandez's Fourth and Fifth Amendment rights through the use of "excessive, deadly force." Finally, for their eleventh claim, the Appellants invoked the district court's jurisdiction under the Alien Tort Statute ("ATS"), alleging that Hernandez "was shot in contravention of international treaties, conventions and the Laws of Nations."

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[2] Specifically, the FTCA claims were based on (1) assault and battery, (2) negligence, (3) Agent Mesa's use of excessive and deadly force, (4) the negligent adoption of policies that violated Hernandez's rights, (5) the negligent failure to adopt policies that would have protected Hernandez's rights, (6) the intentional adoption of policies that violated Hernandez's rights, and (7) the intentional failure to adopt policies that would have protected Hernandez's rights.

The United States moved to dismiss the claims against it, which included all claims except for the *Bivens* action against Agent Mesa. As a preliminary matter, the district court determined that under the Westfall Act, 28 U.S.C. § 2679, the United States was the only proper defendant for the common law tort claims because Agent Mesa was acting in the course and scope of his employment. The Appellants did not dispute this determination, and the court substituted the United States as the only party-defendant for those claims. *See* 28 U.S.C. § 2679(b)(1) (establishing an FTCA claim against the United States as the exclusive remedy for any tort claim based on the acts of a government employee acting in the course and scope of his employment). The district court then granted the motion to dismiss, holding that the United States had not waived sovereign immunity for these claims under either the FTCA or the ATS.

After the court dismissed the claims against the United States, the Appellants amended their complaint to add four *Bivens* actions against Agent Mesa's supervisors—Ramiro Cordero, Scott Luck, Victor Manjarrez, Jr., and Carla Provost. The Appellants asserted that these supervisors violated Hernandez's Fourth and Fifth Amendment rights "by tolerating and condoning a pattern of brutality and excessive force by Border Patrol agents; systematically failing to properly and adequately monitor and investigate incidents of brutality or supervise and discipline officers involved in such misconduct; creating an environment to shield agents from liability for their wrongful conduct; and inadequately training officers and agents regarding the appropriate use and restraint of their firearms as weapons." Additionally, the Appellants alleged that the supervisors "had actual and/or constructive knowledge" that Agent Mesa's conduct "posed [a] pervasive and

unreasonable risk of constitutional injury" and that their response to such knowledge was "so inadequate as to show deliberate indifference or tacit authorization of alleged offensive practices."

Shortly thereafter, Agent Mesa moved to dismiss the claims against him, asserting qualified immunity and arguing that Hernandez, as an alien injured outside the United States, lacked Fourth or Fifth Amendment protections. The district court agreed and dismissed the claims against Agent Mesa. Specifically, the court relied on *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), to hold that Hernandez could not invoke the Fourth Amendment's protection because he was an alien with no voluntary ties to the United States. The court found *Boumediene v. Bush*, 553 U.S. 723 (2008), inapplicable because *Boumediene* said nothing about "the Fourth Amendment right against unreasonable searches and seizures." The court then dismissed the Appellants' Fifth Amendment claim, holding under *Graham v. Connor*, 490 U.S. 386 (1989), that excessive force claims should be analyzed only under the Fourth Amendment.

Finally, the supervisors sought dismissal of, or alternatively summary judgment on, the remaining *Bivens* action against them. The supervisors argued that the Appellants had failed to adequately allege a violation of clearly established Fourth or Fifth Amendment rights and that, even if they had, the supervisors were not personally responsible for any constitutional violation. The Appellants responded by voluntarily dismissing Agent Luck and Agent Provost. The district court then granted summary judgment for the remaining defendants, Agent Cordero and Agent Manjarrez, holding that the Appellants had failed to show "that the Defendants were personally involved in the June 7 incident" or that there was a causal link "between the

Defendants' acts or omissions and a violation of Hernandez's rights."[3] The court noted that Agent Cordero had not supervised agents in Agent Mesa's position "since 2006–four years before the June 7 incident." Additionally, Agent Manjarrez was transferred to a different sector from Agent Mesa's "eight months before the June 7 incident." The court found both of these gaps created "too remote a time period to raise a genuine issue of material fact that [the supervisors'] actions or omissions proximately caused [the Appellants'] harm."[4]

The Appellants timely appealed each adverse judgment, and we consolidated the appeals for review.[5]

II. CLAIMS AGAINST THE UNITED STATES

A. Federal Tort Claims Act

We begin with the claims asserted against the United States, specifically those asserted under the FTCA. The FTCA "is a limited waiver of sovereign immunity, making the Federal Government liable to the same

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[3] The court assumed for the sake of argument that the Appellants were entitled to invoke Fourth and Fifth Amendment protections in their claims against the supervisors.

[4] The district court also denied the Appellants' request to seek discovery for the limited purpose of uncovering the names of other individuals who had supervised Agent Mesa so that they could file a fourth amended complaint naming the new defendants. Appellants do not argue on appeal that the court abused its discretion in denying their request.

[5] We have jurisdiction over all three appeals under 28 U.S.C. § 1291. Both the decision to grant a motion to dismiss and the decision to grant summary judgment are reviewed de novo. *Bass v. Stryker Corp.*, 669 F.3d 501, 506 (5th Cir. 2012); *Buffalo Marine Servs. Inc. v. United States*, 663 F.3d 750, 753 (5th Cir. 2011).

extent as a private party for certain torts of federal employees acting within the scope of their employment." *United States v. Orleans*, 425 U.S. 807, 813 (1976). The FTCA accordingly gives federal courts jurisdiction over claims against the United States for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The FTCA "also limits its waiver of sovereign immunity in a number of ways." *Sosa v. Alvarez–Machain*, 542 U.S. 692, 700 (2004). The relevant limitation on the waiver of immunity here is the FTCA exception for "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k).

The Supreme Court analyzed the scope of the FTCA's foreign country exception in *Sosa*. There, the DEA hired Mexican nationals to seize a Mexican physician believed to have participated in the interrogation and torture of a DEA agent. *Sosa*, 542 U.S. at 697–98. The physician was abducted from his house in Mexico, held overnight in a motel, and then brought to El Paso, where he was arrested by federal officers. *Id.* at 698. Upon his return to Mexico, the physician sued the United States for false arrest under the FTCA. *Id.* The Ninth Circuit held the United States liable under California law because the DEA had no authority to effect the physician's arrest and detention in Mexico. *Id.* at 699.

The Supreme Court reversed, holding that the FTCA's foreign country exception barred the claim. *See id.* at 712. The Court noted that some courts of appeals had allowed similar actions to proceed under what was known as the "headquarters doctrine," which provided

that "the foreign country exception [would] not exempt the United States from suit for acts or omissions occurring here which have their operative effect in another country." *Id.* at 701 (internal quotation marks omitted). The Court, however, viewed this doctrine as inconsistent with the plain language of the foreign country exception. *See id.* Specifically, the Court found good reason "to conclude that Congress understood a claim 'arising in a foreign country' to be a claim for injury or harm occurring in a foreign country." *Id.* at 704. When the FTCA was passed, "the dominant principle in choice-of-law analysis for tort cases was *lex loci delicti*: courts generally applied the law of the place where the injury occurred." *Id.* at 705. Thus, for plaintiffs injured in a foreign country, "the presumptive choice in American courts under the traditional rule would have been to apply foreign law to determine the tortfeasor's liability." *Id.* at 706. This was the exact result "Congress intended to avoid by the foreign country exception." *Id.* at 707. The headquarters doctrine, then, was inappropriate because its application would "result in a substantial number of cases applying the very foreign law the foreign country exception was meant to avoid." *Id.* at 710. As a result, the Court rejected the headquarters doctrine and held "that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Id.* at 712.

Here, it is undisputed that Hernandez was standing in Mexico when he was shot. Nevertheless, the Appellants argue that Hernandez's injury occurred in the United States. Specifically, the Appellants assert an assault claim and contend that "once the gun has been cocked and aimed and the finger is on the trigger, it is not necessary to wait until the bullet strikes to invoke assault." But at all relevant times, Hernandez was

standing in Mexico. Any claim will therefore necessarily be based on an injury suffered in a foreign country. Accordingly, these tort claims are barred by the foreign country exception under *Sosa*.[6]

B. Alien Tort Statute

The final claim against the United States was brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Supreme Court has held that the ATS is a jurisdictional statute only and does not create a new cause of action for torts in violation of international law. *Sosa*, 542 U.S. at 713–14. The fact that the ATS does not establish a cause of action does not mean that the ATS has no effect. *See id.* at 714 (rejecting the argument that "the ATS was stillborn ... without a further statute expressly authorizing adoption of causes of action"). Instead, courts are authorized under the ATS to "recognize private causes of action for certain torts in violation of the law of nations." *Id.* at 724. This authorization reflects the Supreme Court's belief that the First Congress enacted the ATS "on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* Courts must exercise restraint, however, in

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[6] The Appellants also asserted in their eighth and ninth claims that the United States was liable under the U.S. Constitution. The district court correctly determined that the United States has not waived sovereign immunity for constitutional torts, and the Appellants have not addressed the constitutional claims against the United States on appeal.

considering these causes of action and "should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" the Court recognized. *Id.* at 725.

The Appellants believe they have satisfied this standard by alleging that the United States violated the international prohibition against "extrajudicial killings." Even assuming that to be the case, the Appellants still must show that the United States has waived sovereign immunity for this claim. Other courts to address this issue have held that the ATS does not imply any waiver of sovereign immunity. *See, e.g., Tobar v. United States,* 639 F.3d 1191, 1196 (9th Cir. 2011) ("[T]he Alien Tort Statute has been interpreted as a jurisdiction statute only—it has not been held to imply any waiver of sovereign immunity." (alteration in original)); *Goldstar (Pan.) S.A. v. United States,* 967 F.2d 965, 968 (4th Cir. 1992) (same); *Sanchez–Espinoza v. Reagan,* 770 F.2d 202, 207 (D.C. Cir. 1985) ("The Alien Tort Statute itself is not a waiver of sovereign immunity."). These courts have held that "any party asserting jurisdiction under the Alien Tort Statute must establish, independent of that statute, that the United States has consented to suit." *Tobar,* 639 F.3d at 1196 (quoting *Goldstar,* 967 F.2d at 968.).

We agree with this interpretation of the ATS. "The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Freeman v. United States,* 556 F.3d 326, 334–35 (5th Cir. 2009) (quoting *Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands,* 461 U.S. 273, 287 (1983)) (internal quotation marks omitted). Because sovereign immunity is jurisdictional in nature, "Congress's 'waiver of [it] must be unequivocally expressed in statutory text and

will not be implied.' " *Id.* at 335 (alteration in original) (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). Nothing in the ATS indicates that Congress intended to waive the United States' sovereign immunity. The ATS simply provides, in full, as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. This language contains no explicit waiver of sovereign immunity and does nothing more than establish that district courts have original jurisdiction to consider a discrete set of cases.

The Appellants must establish, independent of the ATS, that the United States has consented to suit. They have failed to do so. Though they reference several treaties to support their claim, the Appellants have not referenced any language indicating that the United States has consented to suit under any of these treaties. Accordingly, the district court properly dismissed the claim brought under the ATS.

III. *BIVENS* ACTION AGAINST AGENT MESA

We turn now to the *Bivens* action against Agent Mesa, which requires an analysis of Agent Mesa's entitlement to qualified immunity. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 609 (1999). The doctrine of qualified immunity, which operates the same under both § 1983 and *Bivens*, "protects public officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Brown v. Strain*, 663 F.3d 245, 249 (5th Cir. 2011) (internal quotation marks omitted). In assessing qualified immunity, we determine "(1) whether the facts that the plaintiff has alleged make out a violation of a

constitutional right; and (2) whether the right at issue was clearly established at the time of the defendant's alleged misconduct." *Ramirez v. Martinez*, 716 F.3d 369, 375 (5th Cir. 2013) (quoting *Brown*, 663 F.3d at 249) (internal quotation marks omitted). "A right is clearly established when 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' " *Id.* (quoting *Jones v. Lowndes Cnty.*, 678 F.3d 344, 351 (5th Cir. 2012)).

Agent Mesa attacks the Appellants' claims on both prongs of the qualified immunity analysis. His first argument, that there was no constitutional violation, is relatively straightforward: (1) any constitutional injury would have occurred in Mexico; (2) the Constitution does not guarantee rights to foreign nationals injured outside the sovereign territory of the United States; (3) therefore the Appellants cannot state a constitutional violation. This uncomplicated presentation of the Constitution's extraterritorial application, however, no longer represents the Supreme Court's view.

In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court provided its clearest articulation of the standards governing the application of constitutional principles abroad. The Court addressed whether aliens designated as enemy combatants and detained at Guantanamo Bay had the constitutional privilege of habeas corpus. 553 U.S. at 732.

In addressing this question, the Court first discussed its sparse precedent on the Constitution's geographic scope and found it to undermine "the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." *Id.* at 755. For example, the *Insular Cases*[7]

[7] "The term *Insular Cases* refers to the series of cases from *De Lima v. Bidwell*, 182 U.S. 1 (1901), to *Balzac v. Porto Rico*, 258 U.S.

addressed "whether the Constitution, by its own force, applies in any territory that is not a State." *Id.* at 756. In those cases, the Court held that the Constitution has independent force in newly acquired territories but recognized the inherent difficulties of imposing a new legal system onto these societies. *Id.* at 757. "These considerations resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories." *Id.* This doctrine illustrated that "the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental personal rights declared in the Constitution,' " while still recognizing the "inherent practical difficulties of enforcing all constitutional provisions 'always and everywhere.' " *Id.* at 758–59 (quoting *Balzac*, 258 U.S. at 312).

Similar practical considerations were apparent in *Reid v. Covert*, 354 U.S. 1 (1957). *Id.* at 759. There, the *Boumediene* Court explained, six Justices held that civilian spouses of U.S. servicemen stationed abroad could not be tried before military courts for murder and were instead entitled to a trial by jury. *See id.* at 760–61. The key disagreement between the plurality of four and the two concurring justices was over the continued precedential value of *In re Ross*, 140 U.S. 453 (1891), in which the Court had held "that under some circumstances Americans abroad have no right to indictment and trial by jury." *Id.* at 760. The four-Justice

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298 (1922), that established the framework for selective application of the Constitution to 'unincorporated' overseas territories." Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. Cal. L.Rev. 259, 263 n. 22 (2009).

plurality sought to overrule *Ross* as "insufficiently protective of the rights of American citizens," whereas the two concurring Justices sought simply to distinguish it based on "practical considerations that made jury trial a more feasible option for [the civilian spouses] than it was for the petitioner in *Ross*." *Id.* at 761. The *Boumediene* Court noted that if practical considerations were irrelevant and citizenship had been the only relevant factor in *Reid*, "it would have been necessary for the Court to overturn *Ross*," something the two concurring justices were unwilling to do. *Id.* at 761–62.

Practical considerations "weighed heavily as well in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where the Court addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war." *Id.* at 762. There, the prisoners were detained in Germany, and the *Eisentrager* Court "stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding," explaining that it " 'would require allocation of shipping space, guarding personnel, billeting and rations' and would damage the prestige of military commanders at a sensitive time." *Id.* at 762 (quoting *Eisentrager*, 339 U.S. at 779). Though the prisoners were denied access to the writ, the *Boumediene* Court did not view the decision as having adopted "a formalistic, sovereignty-based test for determining the reach of the Suspension Clause." *Id.* Instead, the Court noted that practical considerations were integral to *Eisentrager* and stated that "[n]othing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus." *Id.* at 764.

The Court ultimately determined that all of these cases shared a common thread: "the idea that questions

of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764. Based on these considerations, the Court concluded that at least three factors were relevant in determining the reach of the Suspension Clause:

> (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Id. at 766. After analyzing these factors and finding "few practical barriers to the running of the writ," the Court held that the Suspension Clause "has full effect at Guantanamo Bay." *Id.* at 770–71.

Thus, *Boumediene* precludes the categorical test Agent Mesa suggests. Whatever else we may derive from the decision, one principle is clear: *de jure* sovereignty is not "the only relevant consideration in determining the geographic reach of the Constitution." *Id.* at 764. Instead, *Boumediene* and the cases cited therein indicate that our inquiry involves the selective application of constitutional limitations abroad, requiring us to balance the potential of such application against countervailing government interests.[8] In other words, our inquiry is not whether a constitutional principle can be applied abroad; it is whether it should. *See Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)

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[8] *See* Gerald L. Neuman, *Strangers to the Constitution* 8 (1996) (associating this approach with the concurring Justices in *Reid v. Covert* and suggesting that it "boil[s] down to a single right: the right to 'global due process' ").

("But, for me, the question is *which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternative which Congress had before it. The question is one of judgment, not of compulsion." (emphasis added)).

The district court concluded that *Boumediene* had no bearing on this case because it did not specifically address "the Fourth Amendment right against unreasonable searches and seizures." We disagree. Though *Boumediene's* underlying facts concerned the Suspension Clause, its reasoning was not so narrow. The Court surveyed extraterritoriality cases involving myriad constitutional rights and spoke to the extraterritorial application of the Constitution, not simply the Suspension Clause. *See Boumediene*, 553 U.S. at 764 ("Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of *the Constitution* or of habeas corpus." (emphasis added)); *id.* ("[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism."). Our extraterritoriality analysis must therefore track *Boumediene's*.

Specifically, three "objective factors and practical concerns" are relevant to our extraterritoriality determination: (1) the citizenship and status of the claimant, (2) the nature of the location where the constitutional violation occurred, and (3) the practical obstacles inherent in enforcing the claimed right. *Cf. id.* at 766–71. The relevant practical obstacles include the consequences for U.S. actions abroad, the substantive rules that would govern the claim, and the likelihood that a favorable ruling would lead to friction with another country's government. *See id.*; *Verdugo-Urquidez*, 494 U.S. at 273–74; *id.* at 278 (Kennedy, J., concurring). These factors are not exhaustive, as the relevant

considerations may change with the facts of an individual case, but they do provide a baseline for addressing questions of extraterritoriality.

The above factors do not obviate our reliance on the text of the Constitution itself. Not all constitutional provisions will have equal extraterritorial application, if any. Some contain geographical references, but others do not. *Compare* U.S. Const. amend. XIII ("Neither slavery nor involuntary servitude [ ] ... shall exist within the United States, or any place subject to their jurisdiction."), *with* U.S. Const. amend. V ("No person shall be ... deprived of life, liberty, or property, without due process of law...."). In *Boumediene*, the "importance of the habeas right itself was an unlisted factor that ... argued in favor of broader reach." Neuman, *The Extraterritorial Constitution*, *supra*, at 287. Accordingly, as with any case of constitutional interpretation, extraterritoriality determinations require an analysis of the operation, text, and history of the specific constitutional provision involved.

With these principles in mind, we analyze whether the Constitution may be held to apply to the Appellants' claims, beginning with those asserted under the Fourth Amendment.

IV. FOURTH AMENDMENT

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. In *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), the Supreme Court, in a 5–4 decision, addressed the question of the Fourth Amendment's extraterritorial reach. There, the DEA cooperated with Mexican police officers to apprehend Verdugo–Urquidez, a citizen and resident of

Mexico. *Verdugo–Urquidez*, 494 U.S. at 262. Mexican officials then authorized the DEA to search Verdugo–Urquidez's Mexican residences, and DEA agents seized a tally sheet believed to reflect the quantities of marijuana Verdugo–Urquidez had smuggled into the United States. *Id.* at 262–63. The district court granted Verdugo–Urquidez's motion to suppress this evidence, and the Ninth Circuit affirmed, concluding that the Fourth Amendment applied extraterritorially to the searches and that the DEA agents had failed to justify their warrantless search of the premises. *Id.* at 263.

On appeal, the Supreme Court began its review of the Ninth Circuit's decision by focusing on the text of the Fourth Amendment. The Court noted that the Fourth Amendment "extends its reach only to 'the people,' " which "seems to have been a term of art employed in select parts of the Constitution," including the Preamble, Article I, and the First, Second, Fourth, Ninth, and Tenth Amendments. *Id.* at 265. Although not conclusive, the Court found this "textual exegesis" to suggest that "the people" in the Constitution "refers to a class of persons who are part of the national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* The Court then examined the history of the drafting of the Fourth Amendment and concluded that "[t]he available historical data shows ... that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory." *Id.* at 266.

The Court next determined that the Ninth Circuit's global view was contrary to the Court's precedent, citing the same cases on which it would later rely in

Boumediene. *See id.* at 268–70. The Court distinguished the cases Verdugo–Urquidez relied on, noting that those cases "establish[ed] only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Id.* at 271. Verdugo–Urquidez, by contrast, had no "significant voluntary connection" to the United States. *Id.*

Finally, the Court addressed the practical problems with the Ninth Circuit's ruling. The Court noted that the Ninth Circuit's global rule "would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in 'searches or seizures.' " *Id.* at 273. Because the United States "frequently employs Armed Forces outside of this country," the application of the Fourth Amendment "to those circumstances could significantly disrupt the ability of the political branches to respond to the foreign situation involving our national interest." *Id.* at 273–74. Additionally, the Court cautioned that the Ninth Circuit's rule would plunge government officials "into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad." *Id.* at 274.

Based on all of the above considerations, the Court rejected the application of the Fourth Amendment to Verdugo–Urquidez's case:

> We think that the text of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorially require rejection of respondent's claim. At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to

> the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.

Id. at 274–75.

Justice Kennedy, one of the five Justices to join the opinion, agreed that no Fourth Amendment violation had occurred but wrote separately to explain his views, even though he did not believe them to "depart in fundamental respects from the opinion of the Court." *Id.* at 275 (Kennedy, J., concurring). Specifically, Justice Kennedy believed that "[t]he force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its terms." *Id.* at 276. As a result, he could not "place any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections." *Id.* Instead, Justice Kennedy concluded that the "restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend[ ] ... on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of 'the people.' " *Id.*

For Justice Kennedy, the lesson from the Court's prior cases was "not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place." *Id.* at 277 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)). "In other words, ... there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make

adherence to a specific guarantee altogether impracticable and anomalous." *Id.* at 277–78 (citation omitted). Based on this reasoning, Justice Kennedy agreed with the Court's outcome because "[t]he conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous." *Id.* at 278. He noted that the "absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." *Id.* Thus, "[f]or this reason, in addition to the other persuasive justifications stated by the Court," Justice Kennedy agreed that no violation of the Fourth Amendment had occurred. *Id.*

The district court here relied on *Verdugo–Urquidez* to hold that Hernandez could not invoke the Fourth Amendment's protection because he was an alien without sufficient, voluntary connections to the United States. The Appellants rely on Justice Kennedy's concurrence to challenge this ruling. Because Justice Kennedy did not "place any weight on the reference to 'the people' in the Fourth Amendment," the Appellants argue that only a plurality of the Court agreed that aliens must have sufficient connections to the United States to be able to invoke the Fourth Amendment's protection. Rather than apply this nonbinding "sufficient connections" test, the Appellants urge us to rely on the "practical and functional" test articulated in Justice Kennedy's concurrence, which they believe was confirmed as the appropriate test in *Boumediene.*

Despite the Appellants' arguments to the contrary, we cannot ignore a decision from the Supreme Court

unless directed to do so by the Court itself. *See Ballew v. Cont'l Airlines*, 668 F.3d 777, 782 (5th Cir. 2012). While the *Boumediene* Court appears to repudiate the formalistic reasoning of *Verdugo–Urquidez's* sufficient connections test, courts have continued to rely on the sufficient connections test and its related interpretation of the Fourth Amendment text. Other circuits have relied on *Verdugo–Urquidez's* interpretation to limit the Fourth Amendment's extraterritorial effect. *See, e.g., Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012) (applying the sufficient connections test in conjunction with *Boumediene's* functional approach); *United States v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir. 2009) ("Aliens do enjoy certain constitutional rights, but not the protection of the Fourth Amendment if they have 'no previous significant voluntary connection with the United States....' " (alteration in original) (quoting *Verdugo–Urquidez*, 494 U.S. at 271)). In addition, just two weeks after the Court issued *Boumediene*, which Appellants argue essentially overrules *Verdugo–Urquidez*, the Court decided *District of Columbia v. Heller*, 554 U.S. 570 (2008), and favorably cited *Verdugo–Urquidez's* definition of "the people." The *Heller* Court explained that "the people" referred "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 580 (citing *Verdugo–Urquidez*, 494 U.S. at 265). Indeed, our own court has relied on *Verdugo–Urquidez's* definition of "the people" in the context of the Second Amendment. *See United States v. Portillo–Munoz*, 643 F.3d 437, 440 (5th Cir. 2011). These examples undercut the Appellants' attempt to discredit *Verdugo–Urquidez*.

We also reject the Appellants' argument that Chief Justice Rehnquist's opinion in *Verdugo–Urquidez* represented only a plurality view on the sufficient

connections requirement. Justice Kennedy expressed no disagreement with the majority's justifications, instead describing them as "persuasive," 494 U.S. at 278 (Kennedy, J., concurring), and finding that his views did not "depart in fundamental respects" from those of the majority, *id.* at 275. This is unsurprising considering that Justice Kennedy joined the opinion of the Court. *Id.* We reject the Appellants' invitation to parse those writings in search of conflicts to nullify the Court's holding.

In sum, we are bound to apply the sufficient connections requirement of *Verdugo–Urquidez*, and we must do so in light of *Boumediene's* general functional approach. Reconciling these approaches is not an impossible task, though, because the *Verdugo–Urquidez* Court relied on more than just the text of the Fourth Amendment to reach its holding. *See Verdugo–Urquidez*, 494 U.S. at 265 (recognizing that its "textual exegesis [was] by no means conclusive"). It relied on the history of the Amendment, *id.* at 266, prior precedent, *id.* at 268–73, and practical consequences, *id.* at 273–75—all factors that we must consider after *Boumediene*.

Under this approach, we conclude that Hernandez lacked sufficient voluntary connections with the United States to invoke the Fourth Amendment. Though Hernandez's lack of territorial presence does not place a categorical bar on the Appellants' Fourth Amendment claims, the Appellants nevertheless do not show that Hernandez formed sufficient connections with the United States. *See Boumediene*, 553 U.S. at 762–764 (rejecting formalistic, sovereignty-based test for determining extraterritorial reach); *see also Ibrahim*, 669 F.3d at 997 (noting that activities abroad can contribute to forming sufficient connections to United States). Hernandez was a citizen of Mexico, not the United States. *See Boumediene*, 553 U.S. at 766 (weighing citizenship and status of detainee in

determining the reach of the Suspension Clause); *Verdugo–Urquidez*, 494 U.S. at 273 (citing cases that accord different protections to aliens than to citizens). This fact alone is not dispositive, *see Boumediene*, 553 U.S. at 766; based on the facts alleged, Hernandez lacked a sustained connection with the United States sufficient to invoke protection. Appellants only allege that Hernandez played a game that involved touching the border fence and "had no interest in entering the United States." *See Boumediene*, 553 U.S. at 766 (noting that detainees at Guantanamo Bay have been held "for the duration of a conflict that ... is already among the longest wars in American history"); *Verdugo–Urquidez*, 494 U.S. at 272 (noting that Verdugo–Urquidez was in the United States "for only a matter of days"); *see also Ibrahim*, 669 F.3d at 997 (holding that Ibrahim established a sufficient connection as a result of her four years studying in the United States). Appellants do not suggest that Hernandez "accepted some societal obligations," including even the obligation to comply with our immigration laws, that might have entitled him to constitutional protection. *See Verdugo–Urquidez*, 494 U.S. at 273; *Martinez–Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) (holding that alien's "regular and lawful entry of the United States pursuant to a valid border-crossing card and ... acquiescence in the U.S. system of immigration constitute[d] voluntary acceptance of societal obligations, rising to the level of 'substantial connections' "). Therefore, Hernandez's voluntary connections with the United States were insufficient to invoke the Fourth Amendment.

Finally, our reluctance to extend the Fourth Amendment on these facts reflects a number of practical considerations. "The 2,000–mile–long border between Mexico and the United States is the busiest in the world, with over 350 million crossings per year." Br. of Gov't of

the United Mexican States as Amicus Curiae in Support of Appellants, 2. We have long recognized this area is unique for Fourth Amendment purposes. For instance, we allow broader search powers at our international borders and their functional equivalents because "national self protection reasonably requir[es] one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Almeida–Sanchez v. United States*, 413 U.S. 266, 272 (1973) (quoting *Carroll v. United States*, 267 U.S. 132, 154 (1925)) (internal quotation marks omitted). In the past decade, "the number of Border Patrol agents has doubled from approximately 10,000 to more than 21,000 agents," with most of these agents working along the Southwest border. *Border Security, Economic Opportunity, and Immigration Modernization Act: Hearing on S. 744 Before the S. Comm. on the Judiciary*, 113th Cong. 6 (2013). The Department of Homeland Security now uses advanced technologies to monitor our borders, "including mobile surveillance units, thermal imaging systems, and large- and small-scale non-intrusive inspection equipment," as well as "124 aircraft and six Unmanned Aircraft Systems operating along the Southwest border." *Id.* at 6–7. These sophisticated systems of surveillance might carry with them a host of implications for the Fourth Amendment, *cf. Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that when the government "uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant"), and they do not look strictly inward. We cannot know all of the circumstances in which these tools will be used to effect a search or seizure outside our borders. But we do know that, as in *Verdugo–Urquidez*, "[a]pplication of the

Fourth Amendment to [these] circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest" and could also plunge Border Patrol agents "into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad." 494 U.S. at 273–74.

Thus, under the Supreme Court's directives and considering the national interests at stake along our borders, we hold that, under the circumstances presented here—an alleged seizure occurring outside our border and involving a foreign national—the Fourth Amendment does not apply.

V. FIFTH AMENDMENT

We turn now to the Appellants' Fifth Amendment claim. The Due Process Clause of the Fifth Amendment provides, "No person shall be ... deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This constitutional protection contains both a substantive and a procedural component. The substantive component "prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty,' " whereas the procedural component ensures that any government action surviving substantive due process scrutiny is "implemented in a fair manner." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citations omitted).

The Appellants' claim implicates the substantive component of the Fifth Amendment's Due Process Clause. Specifically, the Appellants allege that Agent Mesa showed callous disregard for Hernandez's Fifth Amendment rights by using excessive, deadly force when Hernandez was unarmed and presented no threat. This

type of claim is unusual because excessive-force claims are typically analyzed under the Fourth Amendment. Indeed, when the Fourth Amendment applies, excessive-force claims *must* be analyzed under that amendment. *Graham v. Connor*, 490 U.S. at 395. But when a claim is not covered by the Fourth Amendment, we have recognized that an excessive-force claim may be asserted as a violation of due process. *See, e.g., Petta v. Rivera*, 143 F.3d 895, 900 (5th Cir. 1998) (concluding that the plaintiffs had "asserted a valid claim under § 1983 for a constitutional violation for excessive force under the Fourteenth Amendment"). The question now is whether this constitutional protection can be applied extraterritorially.

A. Extraterritorial Application

The Appellants' Fifth Amendment claim is not constrained by prior precedent on extraterritoriality, unlike their claim under the Fourth Amendment. First, the Fifth Amendment's text does not limit the category of individuals entitled to protection. *See, e.g., Lynch v. Cannatella*, 810 F.2d 1363, 1374–75 (5th Cir. 1987). Whereas the Fourth Amendment applies only to "the people," a term of art, the Fifth Amendment applies by its express terms to "any person." *Id.* Therefore, our court has concluded that "[e]xcludable aliens are not non-persons." *Id.* This significantly different language leads us to the conclusion that *Verdugo–Urquidez's* sufficient connections test, which provides a gloss for the term "the people," does not apply in interpreting the extraterritorial application of the Fifth Amendment. Additionally, the Supreme Court has recognized some Fifth Amendment protections apply extraterritorially. *See, e.g., Reid*, 354 U.S. at 18–19 (plurality opinion); *id.* at 49 (Frankfurter, J., concurring) (concluding that, at least

as to capital cases overseas, "the exercise of court-martial jurisdiction over civilian dependents in time of peace cannot be justified by Article I, considered in connection with the specific protections of Article III and the Fifth and Sixth Amendments"). Thus, whether the Fifth Amendment applies here depends on the objective factors and practical concerns we recognized above. *See Boumediene*, 553 U.S. at 766.

The first relevant factor is the citizenship and status of the claimant. Inside U.S. territory, a claimant's citizenship will ordinarily have no impact on whether the claimant is entitled to constitutional protection. But "[i]n cases involving the extraterritorial application of the Constitution, [the Court has] taken care to state whether the person claiming its protection is a citizen or an alien." *Verdugo–Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring) (citations omitted). "The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." *Id.* *Boumediene* teaches that a claimant's citizenship is not dispositive, as it provided an example of a limited "class of noncitizens" entitled to constitutional protection, i.e., those detained at Guantanamo Bay. But the focus on citizenship is still important given the significance of applying constitutional protections abroad at all, let alone to noncitizens. Here, it is undisputed that Hernandez was a Mexican citizen with no connection to the United States. Yet, unlike the "enemy aliens" detained during the Allied Powers' post-World War II occupation in *Eisentrager*, 339 U.S. at 765–66, or the "enemy combatants" held pursuant to the Authorization for Use of Military Force in *Boumediene*, 553 U.S. at 734, 767, Hernandez was a civilian killed outside an

occupied zone or theater of war. Thus, while Hernandez's citizenship weighs against extraterritorial application, his status does not.

The second factor requires us to look at the "nature of the sites" where the alleged violation occurred. In *Boumediene*, the Court examined the level of control the United States exerted over the site where the individual's apprehension and detention occurred. The Court concluded that, although Guantanamo Bay was "technically outside the sovereign territory of the United States," the United States "has maintained complete and uninterrupted control of the bay for over 100 years." *Boumediene*, 553 U.S. at 764, 768. The court looked to the "political history" of Guantanamo and took into consideration the lease agreement permitting the United States to maintain control over Guantanamo. *Id.* at 764–65. By contrast, the Court reasoned that the United States control over Landsberg Prison in occupied Germany in the *Eisentrager* case was transient and that the United States was accountable to its "Allies for all activities occurring there." *Id.* at 768.

We therefore reject Agent Mesa's argument that *Eisentrager*—which held that enemy aliens beyond the territorial jurisdiction of any court of the United States could not invoke the protections of the Fifth Amendment—compels a result in his favor. As mentioned above, *Boumediene* rejected such a formalistic reading of *Eisentrager*. Although *de jure* sovereignty "is a factor that bears upon which constitutional guarantees apply," nothing "in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution." *Boumediene*, 553 U.S. at 764.

Based on the nature of the border area where the shooting occurred, we cannot say that the United States exercises no control. Unlike both Guantanamo and Landsberg Prison, this is not a case requiring constitutional application in a far-away location. Agent Mesa was standing inside the United States, an area very much within U.S. control, when he committed the act. Border Patrol agents exercise their official duties within feet of where the alleged constitutional violation occurred. In fact, agents act on or occasionally even across the border they protect. Amici for Appellants inform us that Border Patrol agents have reportedly fatally shot and killed individuals across the border in several incidents. *See* Br. of Amici Curiae Border Network for Human Rights, et al., in Support of Appellants, 8–12.[9] Therefore, in a very blunt sense, Border Patrol agents exercise hard power across the border at least as far as their U.S.-based use of force injures individuals.

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[9] *See also More Accounts Emerge Following Deadly Border Shooting*, Nogales International, Jan. 6, 2011, http://perma.cc/Q335-QL34 (reporting that a Border Patrol agent shot and killed Mexican national Ramses Barron Torres, 17, who was standing in Nogales, Mexico); Office of Public Affairs, Dep't of Justice, *Federal Officials Close the Investigation into the Death of Ramses Barron-Torres*, Aug. 9, 2013, http://perma.cc/6Z3U-4MWJ (concluding that Barron-Torres was "on the Mexico side of the border fence when he was shot"); Office of Public Affairs, Dep't of Justice, *Federal Officials Close the Investigation into the Death of Carlos LaMadrid*, Aug. 9, 2013, http://perma.cc/H64L-AYD4 (declining to prosecute Border Patrol agent who fired at individual across border shot and killed U.S. citizen Carlos Madrid, 19, who was in the line of fire); R. Stickney, *ACLU Calls for Probe in Border Shooting*, NBC San Diego, June 22, 2011, http://perma. cc/TMD5-EMAQ (reporting that Border Patrol agent shot and killed Mexican national Jose Alfredo Yanez Reyes on Mexican side of border fence near San Diego, California).

Boumediene further instructs us to look at the political history of a location to understand how the United States might exercise control. Here, the control exercised in cross-border shootings reflects broader U.S. customs and border protection policies that expand U.S. control *beyond* the nation's territorial borders. The Chief of the U.S. Border Patrol explains that U.S. border security policy "extends [the nation's] zone of security outward, ensuring that our physical border is not the first or last line of defense, but one of many." *Securing Our Borders—Operational Control and the Path Forward: Hearing Before the Subcomm. on Border and Maritime Security of the H. Comm. on Homeland Security*, 112th Cong. 8 (2011) (prepared statement of Michael J. Fisher, Chief of U.S. Border Patrol). For example, Bureau of Customs and Border Protection officials are authorized to conduct "preinspection" examination and inspection of passengers for final determination of admissibility and crew "at the port or place in foreign territory." 8 C.F.R. § 235.5(b); *see also* Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 Stan. J. C.R. & C.L. 165, 174–77 (2007). Moreover, this recent articulation of extraterritorial policy appears to be only the latest manifestation in a long history of United States involvement beyond the U.S.-Mexico border. *See* Eva Bitran, Note, Boumediene *at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 Harv. C.R.-C.L. L.Rev. 229, 244–47 (2014) (collecting historical examples showing that United States "exerts and has exerted powerful influence over northern Mexico").

The Border Patrol's exercise of control through its use of force at and across the border more closely resembles the control the United States exercised in Guantanamo than it does the control over Landsberg Prison in *Eisentrager*. First, U.S. power at the border is

not transient. *Boumediene* distinguished *Eisentrager* because the control the United States exercised in Landsberg Prison in *Eisentrager* was transient. But here, Border Patrol agents are not representatives of a temporary occupational force. They are influential repeat players in a "constant" border relationship. *See Boumediene*, 553 U.S. at 768–69. Second, U.S. officers at the border are not "answerable to" U.S. border partners in the way Landsberg jailers were to Allied authorities. *Id.* at 768. In fact, the Mexican government requests that U.S. government actors are held accountable in U.S. courts for actions on Mexican territory. Br. of Gov't of the United Mexican States as Amici Curiae in Support of Appellants, 16. Therefore, this situation is different from the Allied occupation of Germany, where authorities shared accountability.

In sum, even though the United States has no formal control or de facto sovereignty over the Mexican side of the border, the heavy presence and regular activity of federal agents across a permanent border without any shared accountability weigh in favor of recognizing some constitutional reach.

Finally, we address the practical obstacles and other functional considerations extraterritorial application would present. We recognized some of the practical concerns already: the national interest in self-protection; the constant need for surveillance, often with advanced technologies; and concerns over varying degrees of reasonableness depending on an agent's location at any given time. While these practical concerns counsel against the Fourth Amendment's application, they do not carry the same weight in the Fifth Amendment context because different standards govern the respective claims.

The Fourth Amendment protects against unreasonable searches and seizures, while, in this context, the Fifth Amendment protects against arbitrary conduct that shocks the conscience. The level of egregiousness required to satisfy the latter standard militates against protecting conduct that reaches it. We abstained from placing Fourth Amendment limits on actions across the border in part to allow officials to preserve our national interest in self-protection. A reasonableness limitation would have injected uncertainty into the government's decision-making process, perhaps resulting in adverse consequences for U.S. actions abroad. That interest, however, plays no role in determining whether an alien is entitled to protection against arbitrary, conscience-shocking conduct across the border. This principle protecting individuals from arbitrary conduct is consistent with those our government has recognized internationally,[10] and applying it here would hardly cause friction with the host government. The Mexican government submitted a brief seeking to "allay any concerns that ... a ruling in the plaintiffs' favor would interfere with Mexico's sovereignty or otherwise create practical difficulties." Br. of Gov't of the United Mexican States as Amici Curiae in Support of Appellants 3.

Because Agent Mesa was inside our territory when he allegedly acted unconstitutionally, the United States, like in *Boumediene*, "is, for all practical purposes, answerable to no other sovereign for its acts." 553 U.S. at 770. If the Constitution does not apply here, the only check on unlawful conduct would be that which the

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[10] *See, e.g.*, International Covenant on Civil and Political Rights art. 6(1), Mar. 23, 1976, 999 U.N.T.S. 171 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

Executive Branch provides. *Cf. Boumediene*, 553 U.S. at 765 (noting a concern that "the political branches have the power to switch the Constitution on or off at will" and would represent "a striking anomaly in our tripartite system of government"). Indeed, a strict, territorial approach would allow agents to move in and out of constitutional strictures, creating zones of lawlessness. That approach would establish a perverse rule that would treat differently two individuals subject to the same conduct merely because one managed to cross into our territory.

Significantly, recognizing extraterritorial application of the Fifth Amendment for conscience-shocking conduct would not force agents to change their conduct to conform to a newly articulated standard. We have already recognized that aliens inside our borders, even those found to be excludable, are entitled "to be free of gross physical abuse at the hands of state or federal officials." *Lynch*, 810 F.2d at 1374; *see also Martinez-Aguero*, 459 F.3d at 626 ("*Lynch* plainly confers on aliens in disputes with border agents a right to be free from excessive force, and no reasonable officer would believe it proper to beat a defenseless alien without provocation, as Martinez-Aguero alleges."). To extend that right to those injured across the border by U.S. officers located in the United States would have the unremarkable effect of informing federal officials that they are also prohibited from arbitrarily inflicting harm in this new, but similar, context.

We will enforce the applicable constitutional principle, unless textual, precedential, or practical barriers bar judicial redress of constitutional violations—that is, when enforcing it is not "impracticable and anomalous." *Boumediene*, 553 U.S. at 759 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)). Here it is not. We therefore hold that a

noncitizen injured outside the United States as a result of arbitrary official conduct by a law enforcement officer located in the United States may invoke the protections provided by the Fifth Amendment.

B. *Bivens* Action

Next, we must address whether Appellants have a cause of action against Agent Mesa for the violations they allege. "Under *Bivens* a person may sue a federal agent for money damages when the federal agent has allegedly violated that person's constitutional rights." *Martinez–Aguero*, 459 F.3d at 622 n. 1. Yet *Bivens* is "not an automatic entitlement." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). The Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001).

1. New Context

As a preliminary matter, then, we must decide whether this case presents a "new context" in which *Bivens* might apply. The district court concluded that this case did not present an extension of *Bivens*, because the Supreme Court had previously recognized a *Bivens* action for a claim under the Fifth Amendment. *See Davis v. Passman*, 442 U.S. 228, 248–49 (1979) (extending *Bivens* action for employee's Fifth Amendment Due Process Clause unconstitutional gender discrimination action against congressional employer). But the district court's conclusion overlooks the context-specific approach the Supreme Court has adopted in deciding whether to extend a *Bivens* action. *See Malesko*, 534 U.S. at 68. After all, the Supreme Court has since rejected implying a *Bivens* action in a different Fifth

Amendment Due Process case. *See Wilkie*, 551 U.S. at 562. (declining to recognize a *Bivens* action under the Fifth Amendment for a landowner against federal land management agents accused of harassment). Instead of an amendment-by-amendment ratification of *Bivens* actions, we are bound to examine each new context—that is, each new "potentially recurring scenario that has similar legal and factual components." *Arar v. Ashcroft*, 585 F.3d 559, 572 (2d Cir.2009) (en banc). In defining that context, we describe a scenario neither too general, nor too specific. *Id.*

This case appears to present a new context, though the category of federal defendants is not new. In *Bivens* itself, the Supreme Court recognized a Fourth Amendment claim for unreasonable search and seizure against federal law enforcement agents. 403 U.S. 388, 397. In addition, our Court has permitted a non-citizen to bring a *Bivens* action against Border Patrol agents for false arrest and excessive use of force under the Fourth Amendment for events occurring at the border. *Martinez–Aguero*, 459 F.3d at 625. Finally, our Court implicitly recognized noncitizens' rights against federal officials for Fifth Amendment gross physical abuse claims, but did not explicitly discuss whether the extension of *Bivens* in that case was appropriate. *Lynch*, 810 F.2d 1363, 1374. Because *Lynch* "gave the matter only cursory attention," we still need to conduct "a more complete analysis of the question." *See Engel v. Buchan*, 710 F.3d 698, 703 (7th Cir. 2013) (conducting *Bivens* analysis even though a prior court had implicitly extended *Bivens* in the same context). In sum, faced with a new situation, we must analyze whether an individual should have a *Bivens* remedy arising under the Fifth Amendment against a federal law enforcement agent for his conscience-shocking use of excessive force across our nation's borders.

2. Extending *Bivens* Action

Having determined that this case raises a new context, we must decide whether to extend a *Bivens* remedy. We first ask "whether any alternative, existing process for protecting the constitutionally recognized interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Minneci v. Pollard*, 132 S. Ct. 617, 621 (2012) (quoting *Wilkie*, 551 U.S. at 550) (alterations and internal quotation marks omitted). Then, we ask whether, in our own judgment, "special factors counsel[ ] hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396; *see also Minneci*, 132 S. Ct. at 621.

a. Alternative Remedies

There is no question that Appellants lack any alternative remedy for their Fifth Amendment right. An alternative, existing process merely has to "provide roughly similar incentives for potential defendants to comply with [the constitutional requirements] while also providing roughly similar compensation to victims of violations." *Engel*, 710 F.3d at 705 (alteration in original) (quoting *Minneci*, 132 S. Ct. at 625). According to the Mexican government, the Appellants cannot sue Agent Mesa in Mexican courts, because, as long as "Agent Mesa avoids travel to Mexico, any effective and enforceable remedy against him can only come from the U.S. courts." Br. of Gov't of the United Mexican States as Amicus Curiae for Appellants 16. The Appellants may not sue Agent Mesa under state law either, because plaintiffs "ordinarily *cannot* bring state-law tort actions against employees of the Federal Government." *Minneci*, 132 S. Ct. at 623 (citing 28 U.S.C. §§ 2671,

2679(b)(1) ("the Westfall Act") (substituting the United States as defendant in tort action against federal employee)); *Osborn v. Haley*, 549 U.S. 225, 238, 241 (2007). Besides, as discussed above, an individual in Hernandez's position will never be able to recover under the FTCA because of the application of the foreign-country exception. *See supra* Part II.A.[11]

Appellants also do not appear to lack an alternative remedy as a result of Congress's deliberate choice. Congress has not chosen to skip over a remedy within an "elaborate, comprehensive scheme" that otherwise would cover Appellants' alleged constitutional violation. *See*

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[11] The Westfall Act also shows that Congress intended to make a *Bivens* remedy available in most circumstances. The Westfall Act of 1988 expanded officer immunity by making an FTCA claim against the United States an exclusive remedy, *see* 28 U.S.C. § 2679(b)(1), but Congress also implicitly ratified the availability of an action for damages against federal officers for constitutional violations—that is, a *Bivens* action—even where FTCA claims are available, *see* 28 U.S.C. § 2679(b)(2)(A) (the exclusiveness of a remedy under the FTCA "does not extend or apply to a civil action against an employee of the Government ... which is brought for a violation of the Constitution of the United States."). Courts have recognized that this provision expresses Congress's intent to preserve *Bivens* actions. *See, e.g., Simpkins v. D.C. Gov't*, 108 F.3d 366, 371–72 (D.C. Cir. 1997) (noting that § 2679(b)(2)(A) provides an "exception for *Bivens* actions against government employees"); *Vance v. Rumsfeld*, 701 F.3d 193, 208 (7th Cir. 2012) (en banc) (Wood, J., concurring in the judgment), *cert. denied*, 133 S. Ct. 2796 (2013); *see also* James E. Pfander and David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 132–38 (2009) (arguing that Congress "joined the Court as a partner in recognizing remedies in the nature of a *Bivens* action [based on] the Westfall Act's preservation of suits for violation of the Constitution and [on] the considerations that led to its adoption."). As a result, Congress has indicated an intent to preserve the availability of *Bivens* actions at least in those instances where an alternative remedial scheme does not preclude it.

Bush v. Lucas, 462 U.S. 367, 385 (1983); *see also Zuspann v. Brown*, 60 F.3d 1156, 1161 (5th Cir. 1995) (holding that Congress created a comprehensive review of veterans' benefits disputes and explicitly precluded judicial review of veterans' benefits disputes, so that Congress's failure to create a remedy against individual Veterans Affairs employees was "not an oversight"). In particular, the elaborate system of remedies and procedures under the immigration system are not relevant to this case.

In *Arar v. Ashcroft*, the Second Circuit suggested but did not decide that Congress's "substantial, comprehensive, and intricate remedial scheme in the context of immigration" might preclude a *Bivens* remedy for a noncitizen who alleged that federal officials illegally detained him, ordered his removal to Syria, and encouraged and facilitated his interrogation under torture. 585 F.3d at 572. In *Mirmehdi v. United States*, the Ninth Circuit held that "Congress's failure to include monetary relief [under the Immigration and Nationality Act for constitutionally invalid detention] can hardly be said to be inadvertent" in light of the frequent attention Congress has given the statute. 689 F.3d 975, 982 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 2336 (2013). But unlike those contexts—extraordinary rendition and wrongful detention pending removal proceedings, respectively—it is far from clear that Congress intended for the Immigration and Nationality Act to provide remedies (or purposefully omit them) for a situation like that in the case presented. Quite plainly, even though Agent Mesa is an immigration law enforcement officer, *see* 8 U.S.C. § 1357 (providing law enforcement powers of immigration officers); 8 C.F.R. § 287.5 (giving law enforcements power to border patrol agents), this is not an immigration case. After all, Agent Mesa's alleged conduct foreclosed any possibility that Hernandez would

access the remedial system for removal that Congress designed. Even had Hernandez survived, he could not have been detained by a U.S. immigration official, because he was in Mexico. Congress has not made it clear through its regulation of immigration that it intends for persons injured by Border Patrol agents—be they citizens or not—to lack a damages remedy for unconstitutional uses of force.

Defendants Cordero and Manjarrez alternatively contend that federal law enforcement agencies provide some remedy by conducting criminal investigations of the incidents. They point to federal homicide statutes, 18 U.S.C. §§ 1111, 1112, and criminal civil rights statutes, *id.* § 242. Far from an adequate alternative, these procedures fail to redress the alleged harm to Appellants, and at most represent a mere "patchwork" of remedies insufficient to overcome *Bivens*. *See Wilkie*, 551 U.S. at 554. Thus, for those in the Hernandez family's shoes, it is a *Bivens* remedy or nothing. *See Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

b. Special Factors Counseling Hesitation

We proceed to step two of the *Bivens* framework, which requires us to exercise our judgment in determining whether "any special factors counsel hesitation." We see none.

Bivens itself provided little guidance on what qualifies as a special factor. *Bivens*, 403 U.S. at 396. Since then the Supreme Court and our sister circuits have identified a handful of "special factors." *See Arar*, 585 F.3d at 573 (describing "special factors" as "an embracing category, not easily defined"). For example, one class of special factors focuses on Congress's express or implied "concerns about judicial intrusion into the sensitive work of specific classes of federal defendants."

Engel, 710 F.3d at 707. The Supreme Court has especially emphasized this rationale in military contexts. *See United States v. Stanley*, 483 U.S. 669, 683–84 (1987) (no *Bivens* action for injuries arising out of or in the course of activity incident to military service); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (holding that "necessarily unique structure of the military" is a special factor counseling against providing *Bivens* remedy). Other circuits have relied on that rationale to refuse to extend *Bivens* suits in a variety of cases arising from actions taken by our government in its War on Terror. *See, e.g., Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012) (holding that constitutional separation of powers and lack of judicial competence counsel hesitation in implying *Bivens* action for enemy combatants held in military detention); *accord Vance v. Rumsfeld*, 701 F.3d 193, 200 (7th Cir. 2012) (en banc); *Ali v. Rumsfeld*, 649 F.3d 762, 773 (D.C. Cir. 2011). One circuit has even extended that reasoning to immigration-related cases. *Mirmehdi*, 689 F.3d at 982. Another species of special factor is the workability of the cause of action. *See Wilkie*, 551 U.S. at 555 (doctrinal workability of cause of action).

This case does not implicate any of these special factors. Agent Mesa did not act in a military setting; nor did his actions implicate national security. Given the similarity of this case to the original *Bivens* remedy and the relative workability of the doctrine, we find no reason to hesitate in extending *Bivens* to this new context. The only argument that might cause us to decline to extend a *Bivens* remedy is the Ninth Circuit's identification of "immigration issues" writ large as necessarily creating a special factor counseling hesitation. *Mirmehdi*, 689 F.3d at 982. Yet, as our discussion of alternative remedies indicates, however, we think this case does not present an "immigration" context. Moreover, even if we did treat

this case as involving an "immigration issue," we would not follow *Mirmehdi's* analysis.

In a case brought by aliens challenging their illegal detention prior to removal proceedings, the Ninth Circuit concluded that claims pertaining to immigration " 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation,' which further 'counsels hesitation' in extending *Bivens*." *Id.* (quoting *Arar*, 585 F.3d at 574). First, we decline to follow *Mirmehdi*, because the opinion unjustifiably extends the special factors identified in *Arar* well beyond that decision's specific national security "context of extraordinary rendition." *Arar*, 585 F.3d at 574. As the Second Circuit remarked with more than a dash of understatement, *Arar* "is not a typical immigration case." *Id.* at 570. In fact, the government's treatment of Arar was so anomalous that the court concluded it could not rely on the provisions of the governing immigration statute, the Immigration and Nationality Act, for any of its holding. *See id.* at 571, 573.

Second, even while we acknowledge Congress's significant interest in shaping matters of immigration policy, which "can affect trade, investment, tourism, and diplomatic relations for the entire Nation," *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012), that fact alone does not give us cause to hesitate, let alone halt, in granting a *Bivens* remedy. The Supreme Court has recently written to emphasize the strong national interest Congress has in protecting aliens from mistreatment.[12] *See id.* The Court noted that

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[12] We note that Sergio's alienage does not amount to a special factor counseling hesitation. Our circuit has previously recognized that an alien may be entitled to a damages remedy against federal officers. *See Martinez-Aguero*, 459 F.3d at 621–22 & n. 1 (recognizing a *Bivens* remedy for an alien); *see also Vance*, 701 F.3d

immigration policy concerns the "perceptions and expectations of aliens in this country who seek the full protection of its laws," acknowledged that the "mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad," and reaffirmed that " '[o]ne of the most important and delicate of all international relationships ... has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.' " *Id.* at 2498–99 (alteration in original) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)).[13] This strong national commitment to aliens' rights not only militates in favor of a uniform, federal policy, as the Court concluded in *Arizona v. United States*; it also militates in favor of the availability of some federal remedy for mistreatment at the hands of those who

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at 203 (rejecting alienage as special factor). The reason for this position is clear: to treat alienage as a special factor for not providing a damages remedy would be to double count our reasons for not providing a substantive right: having settled that Appellants are entitled to bring a claim for substantive due process under the Fifth Amendment even though Hernandez was an alien, we see no additional reason to hesitate in granting a remedy for that right. *See Davis*, 442 U.S. at 246 ("[A]lthough a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counseling hesitation, we hold that these concerns are coextensive with the protections afforded by the Speech or Debate Clause."). The same goes for extraterritoriality. Having already concluded that the right applies extraterritorially, we think it is improper to treat the location of the injury as a factor counting against extension of the remedy.

[13] Although the Supreme Court was not called upon to decide whether these same interests also extend to aliens outside the United States who are under the control of U.S. officers within the United States, we think the principle would be no different. The same concern for the protection of the rights of aliens applies with equal force here.

enforce our immigration laws. Where those who allege mistreatment have a right but lack a remedy, as here, the Supreme Court suggests that Congress would want some remedy to be available.

Third, the case before us involves questions of precisely *Bivens*-like domestic law enforcement and nothing more. *Mirmehdi* implies that cases in the immigration context necessarily involve more than the "mere 'disclosure of normal domestic law-enforcement priorities and techniques,' " 689 F.3d at 983 (quoting *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 490 (1999)). The *Mirmehdi* court asserts such cases "often involve 'the disclosure of foreign-policy objectives and ... foreign-intelligence products.' " *Id.* (quoting *Reno*, 525 U.S. at 490). But nothing in this case bears out that assertion. To accept that conclusion would require us to abandon our prior case law, in which we have permitted *Bivens* actions to proceed against immigration officers. *See Martinez-Aguero*, 459 F.3d at 621–25; *Lynch*, 810 F.2d at 1374. We find no reason for giving immigration officers special solicitude now.

In fact, this case presents a scenario not unlike that in *Bivens*. Just as the Seventh Circuit explained in extending a *Bivens* remedy for alleged *Brady* violations under the Due Process Clause, providing a remedy for a claim of gross physical abuse by a federal law enforcement officer presents "no great problem of judicial interference with the work of law enforcement, certainly no greater than the Fourth Amendment claim in *Bivens*." *See Engel*, 710 F.3d at 708; *cf. Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (arguing that the Supreme Court should cease to extend *Bivens* actions beyond the "precise circumstances that [*Bivens*] involved"). In *Bivens*, the plaintiff brought his lawsuit against federal agents for their warrantless search of his apartment, but also for the unreasonable use of force in

arresting him. *See* 403 U.S. 388, 389 ("[Bivens's]) complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly read, it alleges as well that the arrest was made without probable cause." Here, too, Appellants allege the use of unreasonable force by federal agents. The only difference is that—for the reasons stated above—the Appellants must avail themselves of the Fifth Amendment rather than the Fourth Amendment.

Moreover, "the legal standards for adjudicating the claim are well established and easily administrable." *Engel*, 710 F.3d at 708; *see Wilkie*, 551 U.S. at 555 ("defining a workable cause of action" may be a special factor). Relatedly, we foresee no "deluge" of potential claimants availing themselves of this particular *Bivens* action. *See Davis*, 442 U.S. at 248 (rejecting argument that implying *Bivens* action would cause a deluge of claims). The standards for extraterritorial application of the constitutional right and the substantive definition of that right are so stringent that the creation of a damages remedy will already limit the size of any potential class of claimants under this *Bivens* action.

Therefore, we extend a *Bivens* action in this specific context in which an individual located abroad asserts a right to be free from gross physical abuse under the Fifth Amendment against federal law enforcement agents located in the United States based on their conscience-shocking, excessive use of force across our nation's borders.[14]

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[14] We do not rule on whether a *Bivens* action will be available beyond the scenario here. For example, we do not suggest that a *Bivens* action would be available where military personnel had allegedly violated the individual's right.

C. Qualified Immunity

Having concluded that the Fifth Amendment does apply in this particular extraterritorial context and that *Bivens* provides a remedy, we resume the familiar qualified immunity analysis, beginning with whether Appellants have alleged a constitutional right.

1. Constitutional right

We first address whether the Appellants have sufficiently alleged a Fifth Amendment violation. The district court determined that *Graham v. Connor* precluded the Appellants' Fifth Amendment claim because Agent Mesa's "apprehension by the use of deadly force" amounted to a seizure to be analyzed under the Fourth Amendment. As mentioned above, although it is true that *Graham* requires most excessive force claims to be pursued under the Fourth Amendment rather than under the more general substantive due process standard of the Fifth and Fourteenth Amendments, that rule is not absolute. *Graham* "does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments." *United States v. Lanier*, 520 U.S. 259, 272 n. 7 (1997). Instead, "*Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Id.; see also Petta*, 143 F.3d at 900 (explaining that *Graham* rejected the substantive due process standard "only in cases in which the alleged excessive use of force arguably violated a *specific* right protected under the Bill of Rights"). "Substantive due process analysis is

therefore inappropriate in this case only if [the Appellants'] claim is 'covered by' the Fourth Amendment." *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998).

The inapplicability of the Fourth Amendment in this case establishes that the Appellants' claim is not "covered by" the Fourth Amendment. Thus, *Graham* does not preclude the Appellants from asserting their claim under the Fifth Amendment. Additionally, the facts alleged in the complaint, if proven, would be sufficient to establish a Fifth Amendment violation.

To state a valid claim for a violation of substantive due process, a plaintiff must establish that the officer's actions (1) caused an injury, (2) were grossly disproportionate to the need for action under the circumstances, and (3) were inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience. *Petta*, 143 F.3d at 902; *cf. Lewis*, 523 U.S. at 836 (holding that a state police officer did not violate the Fourteenth Amendment's guarantee of substantive due process by causing a person's death in a high-speed automobile chase because "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation"); *Salerno*, 481 U.S. at 746 (noting that the substantive due process component of the Fifth Amendment "prevents the government from engaging in conduct that shocks the conscience" (citations and internal quotation marks omitted)). "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'...." *Lewis*, 523 U.S. at 846 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)).

But if ever a case could be said to present an official abuse of power so arbitrary as to shock the conscience, the Appellants have alleged it here. According to the Appellants' complaint, Hernandez had retreated behind the pillars of a bridge when, unprovoked, Agent Mesa fired two gunshots in his direction. One of the gunshots struck him in the face and killed him. On these facts, Agent Mesa had no reason to suspect that Hernandez had committed any crime or engaged in any conduct that would justify the use of any, let alone deadly, force. With no apparent justification for this action, a reasonable trier of fact could conclude that Agent Mesa "acted out of conscience-shocking malice or wantonness rather than merely careless or excessive zeal." *Petta*, 143 F.3d at 902–03. We therefore conclude that the Appellants have satisfied the first prong of the qualified immunity analysis by adequately alleging a constitutional violation.

D. Clearly Established Law

Finally, we must determine whether Hernandez's rights were "clearly established" at the time of the incident. According to Agent Mesa, they were not, because the uncertainty in the law surrounding the availability of constitutional rights abroad ensured that any right we might recognize could not have been clearly established at the time of the shooting. This argument, however, misconstrues qualified immunity doctrine. "Clearly established" in this context does not refer to whether Hernandez, specifically, had the clearly established right to invoke Fifth Amendment protection at the time of the incident. It refers instead to the "objective legal reasonableness" of Agent Mesa's action, "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citing *Harlow v.*

Fitzgerald, 457 U.S. 800, 818–19 (1982)). In other words, qualified immunity does not shield conduct that is known to be unlawful merely because it is unclear that such unlawful conduct can be challenged. That is, whether the right applied extraterritorially to Hernandez and thus whether Hernandez could assert the Fourth or Fifth Amendment right does not alter the standard for conduct under those rights. "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends" the law governing the "circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). Thus, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

No reasonable officer would have understood Agent Mesa's alleged conduct to be lawful. The obvious wrongfulness of the alleged conduct but also our precedents concerning the rights of aliens confirm this conclusion. As mentioned above, we have already recognized that aliens inside our border are entitled "to be free of gross physical abuse at the hands of state or federal officials." *Lynch*, 810 F.2d at 1374; *see also Martinez-Aguero*, 459 F.3d at 626–27 ("*Lynch* plainly confers on aliens in disputes with border agents a right to be free from excessive force, and no reasonable officer would believe it proper to beat a defenseless alien without provocation, as Martinez–Aguero alleges.").

Agent Mesa argues that his alleged conduct was acceptable as long as its impact was felt outside our borders. This is not a reasonable misapprehension of the law entitled to immunity. It does not take a court ruling for an official to know that no concept of reasonableness could justify the unprovoked shooting of another person.

See Hope v. Pelzer, 536 U.S. 730, 741, 745 (2002) (noting that cases involving fundamentally similar facts "are not necessary" to finding a right clearly established and holding that "obvious cruelty inherent in [prison official's] practice should have provided respondents with notice that their alleged conduct violated Hope's constitutional protection."). Accordingly, we hold that the facts alleged by the Appellants defeat Agent Mesa's claim of qualified immunity.

VI. CLAIMS AGAINST THE SUPERVISORS

Finally, we address the constitutional claims against Agent Mesa's supervisors. "Because vicarious liability is inapplicable to *Bivens* ... suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). The Appellants allege that the supervisors promulgated policies they knew were inadequate regarding the use of deadly force and also failed to train officers regarding the appropriate use of their firearms. As the district court noted, however, neither of the remaining supervisors was shown to have any personal involvement in the alleged constitutional violation. Specifically, the district court found that Agent Cordero "had not served as a line supervisor for agents in Agent Mesa's position since 2006"—four years before the incident—and that it had been at least eight months since Agent Manjarrez had supervised Agent Mesa. The Appellants do not challenge these findings and point to no specific policy nor any other evidence that would suggest that the supervisors were personally responsible for the alleged constitutional violation. Under these circumstances, the district court properly granted summary judgment in favor of the supervisors.

VII. CONCLUSION

Because the United States has not waived sovereign immunity for any of the claims asserted against it, we AFFIRM the judgment in favor of the United States. Similarly, we AFFIRM the judgment in favor of the supervisors because the Appellants have failed to establish that either supervisor was personally responsible for the alleged constitutional violations. But because we hold that the Appellants can assert a Fifth Amendment claim against Agent Mesa and that they have alleged sufficient facts to overcome qualified immunity, we REVERSE the judgment in favor of Agent Mesa and REMAND for further proceedings consistent with this opinion.

JAMES L. DENNIS, Circuit Judge, concurring in part and concurring in the judgment:

I join the court's opinion in its entirety except for Part IV, with which I agree in part and in result. In *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), the Supreme Court apparently ruled that the phrase "the people" in the Fourth Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this community to be considered part of that community." *Id.* at 265. I am inclined to agree, however, with those who have suggested that the *Verdugo–Urquidez* view cannot be squared with the Court's later holding in *Boumediene v. Bush*, 553 U.S. 723 (2008), that "questions of extraterritoriality turn on objective factors, and practical concerns, not formalism." *Id.* at 764; *see* WAYNE R.

LAFAVE ET AL., 2 CRIM. PROC. § 3.1(i) n. 237.1 (3d ed.2014) (citing Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L.REV. 259, 259, 272 (2008); Ellen S. Podgor, *Welcome to the Other Side of the Railroad Tracks: A Meaningless Exclusionary Rule*, 16 SW. J. INT'L L. 299, 310 (2010)); Baher Azmy, *Executive Detention*, Boumediene, *and the New Common Law of Habeas*, 95 IOWA L.REV. 445, 465 (2010); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L.REV. 973, 1044 (2009); Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L.REV. 1543, 1614 (2010).

The Mexican government has indicated that our adjudication of the Appellants' claims, whether under the Fourth or Fifth Amendment, in this particular case would not cause any friction with its sovereign interests. However, it appears that our judicial entanglement with extraterritorial Fourth Amendment excessive-force claims would be far more likely to involve impracticable and anomalous factors than would a "shocks the conscience" Fifth Amendment claim. For these reasons, I agree with the opinion of the court in declining to apply the Fourth Amendment in adjudicating the Appellants' claims but I do so out of concern for pragmatic and political questions rather than on a formal classification of the litigants involved.

HAROLD R. DeMOSS, JR., Circuit Judge, concurring in part and dissenting in part:

I join in Parts I, II, and VI of the court's opinion and I concur in the result of Part IV. For the reasons stated below, I dissent from Part V.

The majority recognizes that "it is undisputed that Hernandez was a Mexican citizen with no connection to the United States." Majority Op. at 268. Additionally, the majority states "[a]ny claim ... [is] based on an injury suffered in a foreign country[,]" *id.* at 258, a place the majority acknowledges "the United States has no formal control or de facto sovereignty." *Id.* at 270. Nevertheless, the majority determined that the Fifth Amendment is applicable in this case. At its heart, this determination is based on the dubious assessment that there is an undefined area on the Mexican side of the U.S.-Mexico border which is analogous to the United States Naval Station at Guantanamo Bay, Cuba.

The United States' presence at Guantanamo Bay, Cuba, is based on both a lease and a treaty. *Boumediene v. Bush*, 553 U.S. 723, 764 (2008). Furthermore, "the United States 'has maintained complete and uninterrupted control of [Guantanamo Bay] for over 100 years.' " Majority Op. at 269 (quoting *Boumediene*, 553 U.S. at 768). The same cannot be said of the Mexican side of the border. I reject the proposition that occasional exercises of "hard power across the border," *id.* at 269, and practices such as " 'preinspection' examination and inspection of passengers," *id.* at 270, have somehow transformed a portion of northern Mexico into anything resembling the Naval Station at Guantanamo Bay. If the fact that the "United States exerts and has exerted powerful influence over northern Mexico," *id.* (internal quotation marks and citation omitted), justifies application of the Fifth Amendment in a strip along the border, how wide is that strip? Is the Fifth Amendment applicable in all of Ciudad Juarez or even the entire state of Chihuahua? Ultimately, the

majority's approach devolves into a line drawing game which is entirely unnecessary because there is a border between the United States and Mexico.

To be clear, the majority's opinion represents a significant expansion of Fifth Amendment protections which is not supported by precedent. Because I am persuaded that the Fifth Amendment does not protect a non-citizen with no connections to the United States who suffered an injury in Mexico where the United States has no formal control or de facto sovereignty, I would affirm the district court's judgment in favor of Agent Mesa on the Fifth Amendment claim.

APPENDIX D

In the United States District Court
for the Western District of Texas
El Paso Division

JESUS C. HERNANDEZ, et al.,
Plaintiffs,

v.

JESUS MESA, JR., et al.
Defendants.

EP-1-CV-31-DB

MEMORANDUM OPINION AND ORDER

On this day, the Court considered Defendant Jesus Mesa, Jr.'s "First Amended FRCP 12(b)(6) Motion to Dismiss" ("Motion to Dismiss"), filed in the above-captioned cause on August 1, 2011. Also before the Court is Plaintiffs Jesus C. Hernandez, et al.'s Response, filed on August 2, 2011. For the reasons that follow, the Court finds that the instant Motion should be granted.

BACKGROUND AND PROCEDURAL POSTURE

The tragic facts in this case are well known; as such, the Court provides only a brief summary here. On June

7, 2010, fifteen-year old Sergio Adrian Hernández Güereca ("Decedent") while standing on the Mexican side of the border separating the United States and Mexico was shot to death by United States Border Patrol Agent Jesus Mesa, Jr. ("Agent Mesa"), who was standing on the American side of the border when the incident occurred. Plaintiffs filed their Original Complaint under cause number EP-11-CV-027-DB in early January 2011, alleging claims against the United States of America ("the United States") and various federal agencies under the Federal Tort Claims Act ("FTCA"), the Alien Tort Statute ("ATS"), and the United States Constitution ("the Constitution"). Moreover, Plaintiffs alleged claims against unknown border patrol agents under the Constitution.

On June 8, 2011, Plaintiffs filed an Amended Complaint, and on June 27, 2011, Plaintiffs filed their Second Amended Complaint. On August 11, 2011, the Court entered an order dismissing and severing all claims against the United States from the instant action. The same day, the Court entered final judgment pursuant to Federal Rule of Civil Procedure 58. On August 15, 2011, the Court entered an amended final judgment, dismissing Plaintiffs' claims against the United States with prejudice.

On August 22, 2011, Plaintiffs filed their Third Amended Complaint. The Third Amended Complaint raises allegations against Defendants Ramiro Cordero, Scott A. Luck, Victor Manjarrez, Jr., and Carla L. Provost. As to Agent Mesa, the Third Amended Complaint alleges that Agent Mesa acted unreasonably by using excessive, deadly force against Decedent in violation of the Fourth and Fifth Amendments to the Constitution pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) ("*Bivens* claims"). Specificaly, Plaintiffs alleges

that "Mesa shot Decedent ... while attempting to apprehend him ... on suspicion of illegal entry into the United States." Agent Mesa's Motion to dismiss followed.

LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(6)

Defendant files the instant Motion under Federal Rule of Civil Procedure 12(b)(6) ("Rule12(b)(6)"). To determine whether a claim survives a Rule 12(b)(6) motion, courts engage in a two step analysis. *See Ashcroft v. Iqbal*,_U.S._, 129 S. Ct. 1937, 1948-50 (2009); *see also Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 219 (3d Cir. 2010). First, courts review the complaint, separating assertions of fact from legal conclusions. *See id.* "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 129 S. Ct. at 1949. Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Second, courts determine "whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief." *Edwards*, 610 F.3d at 219 (internal quotations omitted). Whether a claim is plausible is context-specific, requiring "the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950.

B. Federal Bivens *Actions*

Pursuant to *Bivens* "the victim of a Fourth Amendment violation by federal officers acting under color of their authority may bring suit for money damages against the officers in federal court." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). Since deciding

Bivens, the Supreme Court has recognized a cause of action for damages against federal officers for violations of the Fifth Amendment as well. *Davis v. Passman*, 442 U.S. 228 (1979). *Bivens* actions are akin to those brought under 42 U.S.C. § 1983.[1] *Andrade v. Chojnacki*, 65 F. Supp. 2d 431, 452 (W.D. Tex. 1999). Therefore, as with cases brought under § 1983, the defense of qualified immunity is also available to federal officers sued under *Bivens*. *Id.*

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgeral*, 457 U.S. 800, 818 (1982). To resolve government officials' qualified immunity claims, courts engage in a two-step inquiry. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (overturned on other grounds). First, a court determines whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* Second, a court determines "whether the right was clearly established ... undertaken in light of the specific context of the case." *Id.* Courts, however, are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236.

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[1] Section 1983 provides a cause of action against persons acting under color of state law for actions that violate a right secured by the Constitution or federal statute. 42 U.S.C.A. § 1983 (West 2003).

DICUSSION

In the instant Motion, Agent Mesa's argument is based solely on the first step of the two-pronged qualified immunity inquiry: do the facts alleged show that the officer's conduct violated a constitutional right? Specifically, Agent Mesa argues that he is entitled to qualified immunity because Decedent was neither protected by the Fourth nor the Fifth Amendments to the Constitution. The Court addresses Agent Mesa's arguments as to Plaintiffs' Fourth Amendment claim before turning to those responding to Plaintiffs' Fifth Amendment claim.

A. Plaintiffs' Fourth Amendment Claim

Here, Agent Mesa argues that he is entitled to qualified immunity because Decedent was an alien without voluntary attachments to the United States, who never entered the country, and because the Supreme Court held in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), that an alien with no voluntary attachment to the United States has no extraterritorial Fourth Amendments rights. In response, Plaintiffs argue that *Martinez-Aguero v. Gonzales*, 459 F.3d 618 (5th Cir. 2006), demands the extraterritorial application of the Fourth Amendment for excessive force inflicted by United States border patrol officers at ports of entry. The Court evaluates these arguments below.

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." U.S. CONST. amend. IV. "*[A]ll* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or

other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham v. Connor*, 490 U.S. 386, 395 (1989) (emphasis in original). Nevertheless, the Supreme Court has restricted the Fourth Amendment's reach based on the citizenship of the person claiming its protections and based on whether the alleged violation of the Fourth Amendment occurred within the territory of the United States or abroad.

In *United States v. Verdugo-Urquidez*, United States Drug Enforcement Agency ("DEA") officers, working in conjunction with Mexican federal police, seized incriminating documents from the Mexican residences of a criminal defendant. 494 U.S. at 262-63. The district court granted the defendant's motion to suppress, holding that "the Fourth Amendment applied to the searches and that the DEA agents had failed to justify searching [the defendant's] premises without a warrant." *Id.* at 263. The court of appeals affirmed. *Id.* The Supreme Court reversed, holding that that "the Fourth Amendment has no application" where "[a]t the time of the search, [the individual seeking its protections] was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico." *Id.*at 274-75.

Here, Agent Mesa asks the Court to dismiss Plaintiffs' Fourth Amendment claim given the Supreme Court's holding in *Verdugo-Urquidez*. Indeed, it is undisputed that Decedent—a resident and citizen of Mexico—was an alien, without voluntary ties to the United States, standing in Mexico when he was killed. Nevertheless, Plaintiffs argue that *Martinez-Aguero* demands the extraterritorial application of the Fourth Amendment for excessive force inflicted by United States border patrol officers at ports of entry. In

Martinez-Aguero, a Mexican citizen and resident who accompanied her aunt once a month to the Social Security office in El Paso, Texas was stopped by United States immigration officials at the border "within the zone outside the port of entry but within the territorial United States." 459 F.3d at 620. An immigration official "grabbed [the Mexican national's] arms, twisted them behind her back, pushed her into a concrete barrier, which hit her in the stomach and then started kicking her with his [the immigration officer's] knees in her lower back." *Id.* at 621(internal quotations omitted). The plaintiff brought a claim under the Fourth and Fifth Amendments for excessive use of force. *Id.* The district court denied the officer's motion for summary judgment on the issue of qualified immunity and the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit") affirmed. *Id.* On appeal, the defendant argued that the plaintiff lacked constitutional rights because although she was in the territorial United States when the incident occurred, she had not been admitted into the country, and as such, the "entry-fiction" doctrine required the court to treat the incident as if it had occurred in Mexico. *Id.* at 622, 623. Nevertheless, the Fifth Circuit found that the entry-fiction doctrine only applied in immigration and deportation cases and proceeded to determine whether the plaintiff had sufficient voluntary connections to the country. *Id.* 624. The Fifth Circuit affirmed the district court's decision, finding that the plaintiff had sufficient voluntary contacts because "her regular and lawful entry into the United States pursuant to a valid border-crossing card and her acquiescence in the U.S. system of immigration constitute her voluntary acceptance of societal obligations, rising to the level of 'substantial connections.'" *Id.*

The instant case can be distinguished from *Martinez-Aguero*. Unlike *Martinez-Aguero*, where the plaintiff was in the territorial United States when the incident occurred, it is undisputed that, in this case, Decedent was outside the United States when shot. Moreover, unlike *Martinez-Aguero*, where the Fifth Circuit found that the plaintiff had voluntary connections, here, Plaintiffs plead nothing in the Third Amendment Complaint to indicate that Decedent had any voluntary connections to the United States. The Court notes that under the heading "Sergio was Entitled to Fifth Amendment Due Process of Law," Plaintiffs' Response briefly states that "Mesa ignores the most obviously sufficient connection between Sergio and the United States, the connection supplied by Mesa himself: Sergio was killed by the actions of a United States government employee acting within the scope of his U.S. government employment." Nevertheless, while this may be a tragic connection to this country, it was not voluntary, and voluntary connections are dispositive in determining whether an alien outside the United States can avail himself of the Fourth Amendment's protections. Finally, the Court briefly addresses Plaintiffs' suggestion that *Boumediene v. Bush*, 553 U.S. 723 (2008), overturned *Verdugo-Urquidez*.

In short, Plaintiffs argue that after *Boumediene*, any notion that the Constitution does not apply extraterritorially to non-citizens is untenable because the Supreme Court in *Boumediene* held that aliens detained in Guantanamo Bay, Cuba had the constitutional privilege of habeas corpus. 553 U.S. at 732. Nevertheless, *Boumediene* is inapposite as its holding says nothing of the Fourth Amendment right against unreasonable searches and seizures. Without more, the Court finds that Plaintiffs' Fourth Amendment claim against Agent

Mesa is dismissed. The Court now turns to Agent Mesa's argument under the Fifth Amendment.

B. Fifth Amendment Claim

In his Motion, Agent Mesa petitions the Court to dismiss Plaintiffs' substantive due process claim under the Fifth Amendment, arguing that aliens have no extraterritorial Fifth Amendment rights. To support this argument, Agent Mesa cites to dicta in *Verdugo-Urquidez*, wherein the Supreme Court states as follows:

> The [*Johnson v.*] *Eisentrager*[, 330 U.S. 763 (1950)] opinion acknowledged that in some cases constitutional provisions extend beyond the citizenry: the alien has been accorded a generous and ascending scale of rights as he increases his identity with our society. [] But our rejection of extraterritorial application of the Fifth Amendment was emphatic.

494 U.S. at 269 (internal quotations omitted). In response, Plaintiffs argue that *Boumediene* "decisively rejected the argument . . . that the Constitution stops where *de jure* sovereignty ends." In other words, Plaintiffs contend that because the Supreme Court once found that a Constitutional right applies outside the United States, this Court should find that other constitutional rights also apply extraterritorially. Nevertheless, the Court need not determine whether the Fifth Amendment applies extraterritorial to a person in Decedent's shoes, because as explained below, Plaintiffs otherwise fail to state a claim for which relief can be granted under the facts presented.

The Fifth Amendment to the Constitution provides in relevant part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

U.S. CONST. amend. V. Nevertheless, as mentioned above, "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395. While "[n]ot all encounters between law enforcement officers and citizens are seizures for purposes of the Fourth Amendment," a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of the citizen." *United States v. Mask*, 330 F.3d 330, 336 (5th Cir. 2003) (internal quotations omitted). Here, Agent Mesa's use of force against Decedent amounted to a seizure, as an "[a]pprehension by the use of deadly force is a seizure." *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011). Therefore, under *Graham*, Plaintiffs fail to state a claim under the Fifth Amendment's Due Process Clause, and the Court finds that Plaintiffs' Fifth Amendment claim against Agent Mesa should be dismissed.

CONCLUSION

The Court finds that Plaintiffs' Fourth and Fifth Amendment claims against Agent Mesa should be dismissed. First, Plaintiffs' Fourth Amendment claim against Agent Mesa is foreclosed by *Verdugo-Urquidez*. Decedent has no Fourth Amendment protections because he is an alien with no voluntary ties to the United States who was in Mexico when the incident occurred. Second, claims for excessive use of force are properly brought under the Fourth Amendment and not the Fifth Amendment. Therefore, Plaintiffs fail to state a claim under the Fifth Amendment.

Accordingly, **IT HEREBY ORDERED** that Defendant Jesus Mesa, Jr.'s "First Amended FRCP 12(b)(6) Motion to Dismiss" is **GRANTED**.

SIGNED this 17th day of **February, 2012.**

/s/ David Briones

The Honorable David Briones

Senior United States District Judge

APPENDIX E

United States District Court,
W.D. Texas,
El Paso Division

Jesus C. HERNANDEZ, et al.,

Plaintiffs,

v.

The UNITED STATES of America, et al.,
Defendants.

No. EP–11–CV–027–DB

Aug. 11, 2011

MEMORANDUM OPINION AND ORDER

DAVID BRIONES, Senior District Judge.

On this day, the Court considered Defendant the United States of America's ("the United States" or "the Government") "Motion to Dismiss the First Through Ninth and Eleventh Claims of the Plaintiffs' Original Complaint," filed in the above captioned cause on June 6,

2011, under Federal Rule of Civil Procedure 12(b)(1).[1] Therein, the Government petitions the Court to dismiss with prejudice Plaintiffs Jesus C. Hernandez, *et al.*'s First through Ninth and Eleventh claims filed in Plaintiffs' Original Complaint for lack of subject matter jurisdiction. Also before the Court are Plaintiffs' Response[2] and the Government's Reply filed June 20, and June 28, 2011, respectively. For the reasons stated below, the Court is of the opinion that the Government's Motion should be granted.

FACTS AND PROCEDURAL POSTURE

On Monday, June 7, 2010, fifteen-year-old Sergio Adrian Hernández Güereca ("Hernández") and a group of friends were playing in the cement culvert that separates the United States from Mexico near the Paso Del Norte Port of Entry, one of four international ports of entry linking El Paso, Texas, with Ciudad Juarez, Chihuahua, Mexico. The young boys were playing a game in which they would touch the barbed-wire fence between the United States and Mexico and then run back down the incline. While playing, United States Border Patrol Agent, Jesus Mesa, Jr., aka Jesus Meza, Jr. ("Agent Mesa"), detained one of the boys. Hernandez retreated to the Mexican side of the border and observed Agent Mesa from underneath a pillar of the international bridge. Agent Mesa then pointed his weapon at Hernandez and shot his firearm across the border at least twice. Hernandez was fatally injured, having been

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[1] The United States files this Motion on behalf of itself, its agencies, Agent Jesus Mesa, and unknown federal agents as to claims under the Federal Tort Claims Act and the Alien Tort Statute.

[2] The Court construes the Plaintiffs' Response as a Motion for Leave to Amend Pleadings.

shot at least once in the face. Additional United States Border Patrol agents subsequently arrived on the scene, but failed to render aid to Hernandez. All agents then left the scene. Eventually, Mexican police arrived and pronounced Hernandez dead.

On January 17, 2011, Plaintiffs filed their Original Complaint with the Court alleging that the Government, unknown federal employees, and various federal agencies[3] were liable under the Federal Tort Claims Act ("FTCA"), the Alien Tort Statute ("ATS"), and the United States Constitution for Hernandez's death. On June 8, 2011, Plaintiffs filed an Amended Complaint, which is different from the Original Complaint in two regards: (1) it names Agent Mesa and (2) it describes how Plaintiffs would serve process upon Agent Mesa.

On June 9, 2011, the Court entered an order granting the Government leave to file the instant Motion in excess of ten pages and held that Plaintiffs' First Amended Complaint did not moot the Government's Motion to Dismiss. On June 18, 2011, Plaintiffs filed their Motion for Leave to file their Second Amended Complaint. On June 27, 2011, the Court granted Plaintiffs' Motion for Leave to file their Second Amended Complaint and held that Plaintiffs' Second Amended Complaint also did not moot the instant Motion.

The claims before the Court on this Motion are Claims One through Nine and Eleven. Plaintiffs bring their First through Seventh Claims under the FTCA. The First Claim alleges wrongful death under the FTCA against the United States based on assault and battery;

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[3] Plaintiffs have sued the following federal agencies: the United States Department of Homeland Security, the United States Bureau of Customs and Border Protection, the United States Border Patrol, the United States Immigration and Customs Enforcement Agency and the United States Department of Justice.

the Second Claim alleges wrongful death under the FTCA against the United States based on negligence; in their Third Claim, Plaintiffs allege under the FTCA that Agent Mesa, acting in his official capacity, used excessive and deadly force against Hernandez; the Fourth Claim is under the FTCA and alleges that unknown federal agents, acting in their official capacity, negligently adopted policies that violated Plaintiffs' constitutional rights; the Fifth Claim is against the United States for negligent failure to adopt policies to protect Hernandez's constitutional rights under the FTCA; in their Sixth Claim, Plaintiffs bring a cause of action against the United States under the FTCA for intentionally failing to adopt policies that would prevent a violation of Plaintiffs' constitutional rights; and the Seventh Claim alleges a cause of action against the United States under the FTCA for intentionally failing to adopt policies to prevent a violation of Plaintiffs' constitutional rights.

Plaintiffs bring their Eighth and Ninth Claims under the United States Constitution. Under the Eighth Claim, Plaintiffs allege that the United States violated Plaintiffs' Fourth and Fifth Amendment rights, while Claim Nine alleges that the United States failed to adopt policies that would have prevented a violation of Hernandez's Fourth and Fifth Amendment Rights. Finally, Plaintiffs bring their Eleventh Claim under the law of nations against all Defendants, invoking the Court's jurisdiction under the ATS. The Court now addresses the instant Motion.

STANDARD

The Government files the instant Motion under Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)"), averring that the Court lacks subject matter jurisdiction over claims against the United States. A

motion under Rule 12(b)(1) allows a party to challenge the subject matter jurisdiction of the district court to hear a case. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The party asserting jurisdiction bears the burden of proving that jurisdiction exists. *Id.* If the party asserting jurisdiction does not meet its burden, the court must dismiss the action. *See* Fed R. Civ. P. 12(h)(3). A court should only grant a motion to dismiss for subject matter jurisdiction "if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming*, 281 F.3d at 161.

DISCUSSION

The Government argues that Plaintiffs' First through Ninth and Eleventh claims should be dismissed because (1) the United States is the only proper Defendant as to those claims; (2) the United States has not waived sovereign immunity for Plaintiffs' claims under the FTCA because those claims arose in a foreign country; and (3) the United States has not waived sovereign immunity for Plaintiffs' claims under the ATS. Plaintiffs respond that the Court has subject matter jurisdiction over Plaintiffs' FTCA claims because those claims did not arise in a foreign country. Moreover, Plaintiffs aver that the ATS does waive the United States' sovereign immunity and cite *Rasul v. Bush*, 542 U.S. 466 (2004), for that proposition. Finally, Plaintiffs seek leave to amend their pleadings a third time.

The Government replies that Plaintiffs' Response lacks merit as Plaintiffs have mischaracterized the United States Supreme Court's ("the Supreme Court") interpretation of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), in arguing that Plaintiffs' FTCA claims did not arise in a foreign country. Further, the Government

contends that the Supreme Court did not hold in *Rasul* that the ATS waives the United States' sovereign immunity, but that custody at Guantanamo Bay, Cuba is not a bar to jurisdiction under the ATS. Finally, the Government does not address Plaintiffs' request for leave to amend their pleadings. The Court evaluates the Parties' arguments below.

As a preliminary matter, the Court notes that the United States is indeed the only party defendant as to Plaintiffs' FTCA and ATS claims. "Under the Westfall Act [28 U.S.C. § 2679(b)(1)], federal employees have absolute immunity from suit for common-law tort claims related to acts undertaken within the scope of their federal employment." *Dolenz v. Fahey*, 298 Fed.Appx. 380, 381 (5th Cir. 2008). "[T]he Westfall Act provides that, if the Attorney General or his designee certifies that a federal employee was acting within the scope of his employment when an alleged act or omission occurred, then the lawsuit automatically is converted to one against the United States under the Federal Tort Claims Act, the federal employee is dismissed as a party, and the United States is substituted as the defendant." *In re Iraq & Afghan. Detainees Litig.*, 479 F.Supp.2d 85, 110 (D.D.C.2007); *see also* 28 § 2679(d)(1) (West 2011). Courts have applied the Westfall Act to claims under the ATS asserting violations of the law of nations. *See In re Iraq & Afghan. Detainees Litig.*, 479 F.Supp.2d at 112.

On June 20, 2011, the United States filed a "Notice of Substitution and Application for Order Thereon," wherein the Government agreed to substitute for Agent Mesa by operation of law as party defendant as to all of Plaintiffs' claims sounding in common law tort under the FTCA and the ATS pursuant to 28 U.S.C. § 2679. Plaintiffs did not oppose this substitution. Indeed, in their Response to the instant Motion, Plaintiffs state that "[n]ow that the United States has moved for substitution

and filed the appropriate certification to the Court, Plaintiffs do not oppose substitution." Therefore, the Court granted the Government's request, and in an Order dated June 24, 2011 ("June 24 Order"), the Court dismissed all claims against Agent Mesa under the FTCA and ATS. The result of the Court's June 24 Order is that the United States is now the only party defendant as to all of Plaintiffs' claims under the FTCA and ATS. Having established that the United States is the only party defendant as to all of Plaintiffs' claims, the Court now turns to the question of whether the United States has waived its sovereign immunity for Plaintiffs' claims.

I. Whether the United States waived its Sovereign Immunity for Plaintiffs' Claims

"Liability may be imposed upon the United States only if two requirements are met: (1) there must be a waiver of sovereign immunity; and (2) there must be a source of substantive law that provides a claim for relief." *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 260 (5th Cir. 2006) (Dennis, J., concurring). With respect to federal sovereign immunity, " '[t]he basic rule ... is that the United States cannot be sued at all without the consent of Congress.' " *Freeman v. United States*, 556 F.3d 326, 334–35 (5th Cir. 2009) (quoting *Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983)). "Plaintiffs bear the burden of showing Congress's unequivocal waiver of sovereign immunity." *Id.* at 334 (internal quotation omitted). "Because sovereign immunity is jurisdictional in nature ... Congress's waiver of it must be unequivocally expressed in statutory text and will not be implied...." *Id.* (internal quotations and citations omitted). Therefore, it follows that a federal court lacks subject matter jurisdiction over claims for which Congress has not waived sovereign

immunity. *Id.* The Court first examines whether Congress has waived sovereign immunity for Plaintiffs' claims under the FTCA.

A. Sovereign Immunity under the FTCA

The FTCA allows a person to sue the United States for the negligence or other tortious conduct of its employees acting within the scope of employment in situations where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the tort occurred. 28 U.S.C.A. § 1346(b)(1) (West 2011). Therefore, the statute is both a waiver of the United States' sovereign immunity and a source of substantive law that imposes liability on the Government for the torts of its employees under certain circumstances.[4] *In re Supreme Beef Processors, Inc.*, 468 F.3d at 260 (Dennis, J., concurring); *see also* 28 U.S.C.A. §§ 1346(b)(1), 2674. This waiver is not unlimited, however, and for policy reasons, Congress decided that the FTCA would also categorically exclude liability for some harms. *In re Supreme Beef Processors, Inc.*, 468 F.3d at 260–61 (Dennis, J., concurring). For example, Congress precluded Government liability when a United States employee exercises a discretionary function. 28 U.S.C.A. § 2680(a) (West 2011). Moreover, Congress has immunized Government employees from intentional

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[4] The statute provides in relevant part that "the district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." § 1346(b)(1).

torts, except when the intentional tort was committed by an investigative or law enforcement officer of the United States. § 2680(h). Finally, Congress conferred immunity on Government employees against liability from torts arising in a foreign country. § 2680(k).

Although the FTCA's foreign country exception clearly states that the provisions of the FTCA do not apply to "[a]ny claim arising in a foreign country," prior to 2004, some federal courts allowed plaintiffs' claims to withstand a motion to dismiss if plaintiffs could show that the act or omission giving rise to a tort occurred in the United States even when the claimant suffered injuries abroad. *See e.g. Mulloy v. United States,* 884 F.Supp. 622, 632 (D.Mass.1995). Nevertheless, in 2004, in *Sosa,* the Supreme Court unequivocally held that "the FTCA's foreign country exception bars all claims based on an injury suffered in a foreign country, regardless of where the tortious act or omission occurred." 542 U.S. at 712. Notwithstanding the Supreme Court's unambiguous directive, Plaintiffs argue that *Sosa* does not control the case at bar. Therefore, the Court must first determine whether it is bound by *Sosa's* clear holding in the instant cause.

In *Sosa,* Drug Enforcement Administration ("DEA") agents hired Jose Francisco Sosa ("Sosa") to abduct Mexican physician Humberto Alvarez–Machain ("Alvarez") in Mexico to stand trial in federal court in the United States because Alvarez assisted in torturing a fellow DEA agent. *Id.* at 697–98. Alvarez was acquitted of the federal criminal charges but subsequently filed a civil action against Sosa under the FTCA and ATS. The district court dismissed Alvarez's FTCA claim but awarded summary judgment and damages on Alvarez's ATS claim. *Id.* at 699. A three judge panel of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") affirmed the ATS claim but reversed the

district court's dismissal of the FTCA claim; a divided en banc panel of the Ninth Circuit came to the same conclusion. *Id.* In reaching its holding on Alvarez's FTCA claim, the Ninth Circuit relied on the "headquarters doctrine." *Id.* at 701. Under the headquarters doctrine, "the foreign country exception [to the FTCA] does not exempt the United States from suit for acts or omissions occurring [in the United States] which have their operative effect in another country." *Id.* (internal quotations omitted). Thus, the Ninth Circuit reasoned "that [ ] since Alvarez's abduction in Mexico was the direct result of wrongful acts of planning and direction by DEA agents located in California, 'Alvarez's abduction fits the headquarters doctrine like a glove.' " *Id.* at 702 (quoting *Alvarez-Machain v. U.S.*, 331 F.3d 604, 638 (9th Cir. 2003) (en banc)). Thus, based on the headquarters doctrine, the Ninth Circuit held that Alvarez's claim did not arise in a foreign country. *Id.*

The Supreme Court reversed, rejecting the Ninth Circuit's interpretation of the foreign country exception. *Id.* at 712. In reaching this conclusion, the Supreme Court found reason to be skeptical of the Ninth Circuit's reliance on the headquarters doctrine because proximate cause[5] was needed to "connect the domestic breach of duty (at headquarters) with the action in the foreign country ... producing the foreign harm or injury." *Id.* at 703. The Supreme Court expressed doubt that the acts of the DEA agents sitting in California were proximate causes of Alvarez's harm, given that "the actions of Sosa

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[5] The Supreme Court defined proximate cause as "causation substantial enough and close enough to the harm to be recognized by law" and found that "a given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm." *Sosa*, 542 U.S. at 704.

and others in Mexico were just as surely proximate causes, as well." *Id.* at 704.

Regardless, the Supreme Court reached its decision in *Sosa* "simply because the harm occurred on foreign soil." *Id.* at 703. The Supreme Court explained that when Congress passed the FTCA, "the dominant principle in choice-of-law analysis for tort cases was *lex loci delicti*: courts generally applied the law of the place where the injury occurred." *Id.* at 705. As a result, if the injury occurred in a foreign country, a federal court in the United States would have to apply foreign law to determine the tortfeasor's liability, and applying foreign substantive law in a federal court is precisely what Congress wanted to avoid in passing the foreign country exception to the FTCA. *Id.* at 706–07. Further, the Supreme Court found that even if a federal court did not have to apply the tort law of a foreign nation, a claimant injured in a foreign country would still be barred from bringing a claim against the United States because Congress did not write the foreign country exception to apply only "when foreign law would be applied." *Id.* at 711. Therefore, the Supreme Court held that "the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Id.*

Here, Plaintiffs ask the Court to ignore *Sosa's* explicit holding because unlike in *Sosa*, where the Supreme Court expressed doubt about whether the proximate cause of Alvarez's harms had occurred in the United States, in the instant cause "[i]t is indisputable that each and every proximate cause of [Hernandez's] injuries and death occurred on United States territory." Even if each and every proximate cause of Hernandez's injuries occurred on United States territory, the Supreme Court also reached its holding in *Sosa* simply because the harm occurred on foreign soil. *See id.* at 703.

Therefore, the Court is of the opinion that if Hernandez suffered his injuries in Mexico—a foreign country—the Court would lack subject matter jurisdiction to hear Plaintiffs' FTCA claims given *Sosa's* clear holding. Yet, Plaintiffs also argue that Hernandez did not suffer his injuries in Mexico. The Court must therefore determine where Hernandez suffered his injuries.

Plaintiffs concede that Hernandez was standing underneath the Mexican side of the Paso Del Norte Bridge when Agent Mesa shot him. Nevertheless, Hernandez argues that the assault "occurred on United States' [sic] territory" because once Agent Mesa cocked his gun and put his finger on the trigger, it was not necessary for the bullet to strike Hernandez to "invoke assault." The United States replies that because Hernandez was standing in Mexico when he perceived Agent Mesa's threat, Hernandez suffered any injury in Mexico and not the United States. The Court thus examines what is required to state a claim for civil assault under Texas law to determine whether Plaintiffs properly characterize the injury as one occurring in the United States and not Mexico.

Under Texas law, a plaintiff must establish the elements of criminal assault to state a claim for civil assault. *See Johnson v. Davis*, 178 S.W.3d 230, 240 (Tex.App.-Houston [14th Dist.] 2005, pet. denied). The Texas Penal Code provides for three categories of assault. *See* Tex. Penal Code Ann. § 22.01 (West 2011). Here, Plaintiffs bring their claims under a type of assault called "assault-by-threat." *Olivas v. Texas*, 203 S.W.3d 341, 345 (Tex.Crim.App.2006). A person commits an assault-by-threat when he "intentionally or knowingly threatens another with imminent bodily injury" TEX. PENAL CODE ANN. § 22.01(a)(2) (West 2011). For the State to convict a defendant of criminal assault, the State must prove that a threat occurred but the State need not

necessarily prove that the victim perceived the threat. *Olivas*, 203 S.W.3d at 346; *Teeter v. Texas*, No. PD–1169–09, 2010 WL 3702360, at *6 (Tex.Crim.App. Sept. 22, 2010). In contrast, under civil assault, "the victim must be shown factually to have experienced apprehension or fear." *See Olivas*, 203 S.W.3d at 346–47. In determining whether a civil assault has occurred, courts will look at the physical distance between the victim and the alleged perpetrator to determine whether the victim felt the harm of the assault. *See Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F.Supp. 993, 1012 (S.D.Tex.1981) ("There is no assault where the defendant is too far away to do any harm.").

Here, Plaintiffs aver that "[t]he assault against [Hernandez's] rights occurred at the very moment that Agent Mesa lifted his gun, pointed it at [Hernandez's] head and pulled the trigger." Yet any rights Hernandez may have had were held in Mexico since Hernandez was standing in Mexico when Agent Mesa allegedly perpetrated the assault. Moreover, the fact that courts look to (1) whether the victim apprehended the assault, *Olivas*, 203 S.W.3d at 346–47, and (2) the physical distance between the victim and the alleged perpetrator of the assault to determine whether an assault has occurred, *Vietnamese Fishermen's Ass'n*, 518 F.Supp. at 1012, further supports the conclusion that the injury in an assault occurs where and when the victim perceives the assault. Therefore, the weight that Plaintiffs place on the *moment* when the assault occurred is misguided and irrelevant for the purpose of determining *where* Hernandez suffered his injury.

Finally, to the extent that Plaintiffs argue that civil assault-by-threat can be proven under Texas law without establishing that a plaintiff experienced fear or apprehension would run afoul of the standing requirements of the federal courts. "Standing to sue in

any Article III court is ... a federal question which does not depend on the party's prior standing in state court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). To have standing to sue in federal court, a plaintiff must have suffered an "injury in fact—an invasion of a legally protected interest which is ... concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An injury is "particularized" when it "affect[s] the plaintiff in a personal and individual way." *Id.* at 561 n. 1. The only way that Hernandez could have been affected in a "personal and individual way" is if he felt the harm of the assault; because Hernandez was standing in Mexico when Agent Mesa allegedly assaulted him, there was no other place where he could have felt the harm.[6] As such, the Court finds that Hernandez suffered his harms in Mexico.

Having decided that *Sosa* applies to the case at bar and that Hernandez suffered his injuries in Mexico, the Court now grants the Government's Motion to Dismiss Plaintiffs' First through Seventh Claims because Congress did not waive the United States' sovereign

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[6] Plaintiffs also argue that Hernandez's negligence claim is cognizable in this case because "the last act necessary to establish negligence against Agent Mesa and the United States occurred in the United States" Plaintiffs misstate the law of negligence. To state a claim in negligence, a plaintiff must prove "a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach." *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex.2002). Here, Plaintiffs Second Amended Complaint states that Plaintiff was standing in Mexico when Agent Mesa allegedly shot and killed him. As such, it is undisputed that the damages, the last act needed to state a claim in negligence, occurred in Mexico. Therefore, the Court finds the FTCA's foreign country exception bars Plaintiffs' negligence claims against the United States, its officers and agencies.

immunity for injuries suffered in a foreign country, "regardless of where the tortious act or omission occurred." *Sosa*, 542 U.S. at 712.

B. Sovereign Immunity for Constitutional Torts

The United States next argues that Plaintiffs' Eighth and Ninth Claims should be dismissed because the United States has not waived sovereign immunity for constitutional torts under the FTCA. Plaintiffs concede that the United States is not a proper party as to these claims. Therefore, the Court grants the United States' Motion as to the Eighth and Ninth Claims in Plaintiffs' Second Amended Complaint because it agrees that the United States has not waived its sovereign immunity for constitutional torts under the FTCA. *See Spotts v. United States*, 613 F.3d 559, 569 n. 7 (5th Cir. 2010).

C. Sovereign Immunity and the ATS

Finally, the Court determines whether the ATS waives the United States' sovereign immunity. The ATS is a jurisdictional statute, conferring jurisdiction upon the federal courts to "hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa*, 542 U.S. at 712. Because "Congress's waiver of [sovereign immunity] must be unequivocally expressed in statutory text and will not be implied," *Freeman*, 556 F.3d at 334–35, the Court looks first to the statutory language to determine if it waives the United States' sovereign immunity. The statute provides that "[t]he district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C.A. § 1350 (West 2011). It is patent from the statute's plain language that a waiver of sovereign immunity is not "unequivocally expressed" as

the ATS says nothing about sovereign immunity or a waiver. *See Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *see also Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992) (per curiam), *cert. denied* 506 U.S. 908 (1992). Notwithstanding the plain language of the statute, Plaintiffs insist that the ATS waives the United States' sovereign immunity because the Supreme Court pronounced in *Rasul*, that "indeed, [the ATS] explicitly confers the privilege of suing for an actionable tort committed in violations of the law of nations or a treaty of the United States on aliens alone." 542 U.S. at 485 (internal quotation omitted). Plaintiffs fundamentally misapprehend the holding in *Rasul*.

In *Rasul*, the Supreme Court decided "the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." *Id.* at 470. Petitioners in *Rasul* sued former President George W. Bush, among other federal employees, invoking the jurisdiction of the United States District Court for the District of Columbia ("District Court") under the ATS. The District Court dismissed the petitioners' ATS claim and the United States Court of Appeals for the District of Columbia Circuit held that "the District Court correctly dismissed the claims founded on ... [the ATS] for lack of jurisdiction, even to the extent that these claims 'deal only with conditions of confinement and do not sound in habeas,' because petitioners lack the 'privilege of litigation' in U.S. courts." *Id.* at 484. (quoting *Al Odah v. United States*, 321 F.3d 1134, 1144 (D.C. Cir. 2003)). Nevertheless, the Supreme Court reversed, holding that the District Court did have jurisdiction to hear the ATS claim and that the petitioners' confinement

in military custody at Guantanamo Bay, Cuba was immaterial to the question of whether the District Court had subject matter jurisdiction over those claims. *Id.* at 485. The Supreme Court in *Rasul* said nothing about whether Congress waived the United States' sovereign immunity in the ATS.[7]

Here, Plaintiffs confuse federal jurisdiction with a waiver of sovereign immunity. While the Court may have jurisdiction to hear claims under the ATS because the ATS is merely a jurisdictional statute, "any party asserting jurisdiction under the [ATS to sue the United States] must establish, independent of that statute, that the United States has consented to suit." *Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011) (internal quotations omitted) (holding that the ATS does not waive the United States' sovereign immunity). Moreover, if the United States waives its sovereign immunity in a treaty, the waiver must be unequivocally expressed. *See De Archibold v. United States*, 499 F.3d 1310, 1313 (Fed. Cir. 2007). Yet, Plaintiffs cite no language in any of the treaties that form the substantive basis for Plaintiffs' ATS claim that indicate that the United States has waived its sovereign immunity for suits in federal court under those treaties. Without more,

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[7] The Court is not alone in this conclusion; indeed, the Court knows of no case decided before or after *Rasul* to have ever held that the ATS waives the United States' sovereign immunity; nevertheless, the case reporters are replete with examples of cases finding unambiguously that the ATS does not waive the United States' sovereign immunity. *See e.g. Sanchez–Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 967–68 (4th Cir. 1992); *Rosner v. United States*, 231 F.Supp.2d 1202, 1210 (S.D.Fla.2002); *Czetwertynski v. United States*, 514 F.Supp.2d 592, 596 (S.D.N.Y.2007); *Al–Aulaqi v. Obama*, 727 F.Supp.2d 1, 43 (D.D.C.2010).

the Court finds that it lacks subject matter jurisdiction over Plaintiffs' claims under the ATS and, as such, grants the Government's Motion as to the Eleventh Claim.

II. Plaintiffs' Construed Motion to Amend Pleadings

Having decided that the Court lacks jurisdiction as to all of Plaintiffs' claims against the United States, the Court now addresses Plaintiffs' construed Motion to Amend Pleadings. Here, Plaintiffs seek leave to amend their Second Amended Complaint to refashion claims against the United States as claims against unknown federal agents under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

A party may amend its pleading once as a matter of course within twenty-one days of serving it or twenty-one days after service of a motion under Rule 12(b), whichever is earlier. FED.R.CIV.P. 15(a)(1). In all other cases, a party may only amend its pleadings with the written consent of the opposing party or with the court's leave. FED.R.CIV.P. 15(a)(2). Courts must "freely give leave when justice so requires." FED.R.CIV.P. 15(a)(2). Although Rule 15(a) creates a liberal standard for granting leave to amend a complaint, some factors weigh against granting leave. *Barnes v. Madison*, 79 Fed.Appx. 691, 698 (5th Cir. 2003). These factors, articulated in *Foman v. Davis*, 371 U.S. 178, 182 (1962), include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment." *Id.* (internal quotations omitted).

In the instant cause, Plaintiffs amended their pleadings once as a matter of right and a second time

with the Court's leave. The Court now finds that it would serve the interest of justice to allow Plaintiffs leave to file a third amended complaint. Nevertheless, the Court cautions the Plaintiffs, in the strongest terms possible, that it will not grant Plaintiffs leave to amend their complaint a fourth time.

III. Severance of Claims against the United States

Finally, the Court *sua sponte* considers whether the claims against the United States should be severed from those against Agent Mesa. Federal Rule of Civil Procedure 21 ("Rule 21") provides in relevant part that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." FED.R.CIV.P. 21. "Rule 21 is an appropriate vehicle to sever or dismiss the claims of even properly joined parties." *Blum v. Gen. Elec. Co.*, 547 F.Supp.2d 717, 722 (W.D.Tex.2008). By severing claims under Rule 21, a district court creates two separate actions by which severed claims may proceed as discrete, independent actions. *Allied Elevator, Inc. v. E. Tex. State Bank*, 965 F.2d 34, 36 (5th Cir. 1992). District courts may then render final judgment in "either one of the resulting two actions notwithstanding the continued existence of unresolved claims in the other." *Id.* (internal quotation omitted). Ultimately, district courts have broad discretion to sever claims under Rule 21. *Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 505 (5th Cir. 1994).

In the instant Order, the Court dismisses all claims against the United States. As such, if the Court severs the claims against the United States, the Court may enter final judgment and allow Plaintiffs to appeal the instant Order, if they so choose, without having to wait for a resolution on their *Bivens* claims against Agent

Mesa. Therefore, the Court finds that the claims against the United States should be severed from those against Agent Mesa and all unknown agents.

CONCLUSION

After due consideration, the Court finds that the Government's Motion should be granted in its entirety. The United States is party defendant as to all claims against Agent Mesa under the FTCA and the ATS. Moreover, Congress has not waived the United States' sovereign immunity under the FTCA when the tort arises in a foreign country. Because the harm that Plaintiffs allege under the FTCA was felt in Mexico, Plaintiffs' tort claims under the FTCA arose in a foreign country, therefore the Court dismisses Claims One through Seven. Further, the United States has not waived sovereign immunity for constitutional torts under the FTCA. As such, the Court dismisses Claims Eight and Nine. In addition, Congress did not waive the United States' sovereign immunity under the ATS, and none of the treaties that form the substantive basis of Plaintiffs' ATS claims unequivocally waive the United States' sovereign immunity. It therefore follows that the Court must dismiss Plaintiffs' Eleventh Claim.

The Court also grants Plaintiffs leave to amend their pleadings and finds that it would be in the interest of justice to grant Plaintiffs' construed Motion for Leave to Amend Pleadings. Finally, the Court finds that all claims against the United States should be severed from those against Agent Mesa and all unknown federal agents such that final judgment may be entered as to the United States.

Accordingly, **IT IS HEREBY ORDERED** that Defendant the United States of America's "Motion to

Dismiss the First Through Ninth and Eleventh Claims of the Plaintiffs' Original Complaint," is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs Jesus C. Hernandez, *et al.*'s construed Motion to Amend the Second Amended Complaint is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs are granted leave to amend their Second Amended Complaint within ten days of the date of this Order.

IT IS FURTHER ORDERED that all claims asserted against Defendants the United States of America, the United States Department of Homeland Security, the United States Bureau of Customs and Border Protection, the United States Border Patrol, the United States Immigration and Customs Enforcement Agency and the United States Department of Justice be **SEVERED** from those claims against Jesus Mesa, Jr. and all unknown Defendants.

IT IS FURTHER ORDERED that the Clerk of the Court **AMEND** the caption in the present action to reflect that claims against Defendant Jesus Mesa, Jr. and all unknown Defendants are no longer included within the above-captioned cause.

IT IS FURTHER ORDERED that the above-captioned cause is **DISMISSED.**

IT IS FINALLY ORDERED that all other pending motions in the above-captioned cause, if any, are **DENIED AS MOOT.**

APPENDIX F

In the United States District Court
for the Western District of Texas
El Paso Division

Jesus Hernández, individually and as the surviving father of Sergio Adrián Hernández Güereca, and as Successor-in-Interest to the Estate of Sergio Adrián Hernández Güereca; María Guadalupe Güereca Bentacour individually and as the surviving mother of Sergio Adrián Hernández Güereca, and as Successor-in-Interest to the Estate of Sergio Adrián Hernández Güereca,
Plaintiffs,

vs.

Ramiro Cordero; Scott A. Luck; Victor Manjarrez, Jr.; Jesus Mesa, Jr., aka Jesus Meza, Jr.; and Carla L. Provost,
Defendants.

Civil Action No. 3:11-CV-00331-DB

Jury Trial Demanded

PLAINTIFFS' THIRD AMENDED COMPLAINT

Plaintiffs, Jesus Hernández Güereca and María Guadalupe Güereca Bentacour (hereinafter "Plaintiffs"),

individually as the surviving parents of Sergio Adrián Hernández Güereca (hereinafter "Decedent," "Sergio"), and as Successors-in-Interest to the Estate of Sergio Adrián Hernández Güereca, complain and allege as follows:

PRELIMINARY STATEMENT AND NATURE OF THE CASE

1. Plaintiffs bring this action against Ramiro Cordero ("Cordero"); Scott A. Luck ("Luck"); Victor Manjarrez, Jr. ("Manjarrez"); Jesus Mesa, Jr., aka Jesus Meza, Jr. ("Mesa"), and Carla A. Provost ("Provost"), employees of the United States of America, in their individual capacities, under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violation of Plaintiff Decedent's individual constitutional rights guaranteed by the Fourth and Fifth Amendments of the United States Constitution as set forth herein.

2. Defendant Jesus Mesa, Jr. used unlawful deadly force in shooting and killing Decedent on June 7, 2010, notwithstanding that Decedent was defenseless, was offering no resistance, had no weapon of any kind, and had not nor was threatening Mesa, or any third party, with harm, deadly or otherwise. Plaintiffs plead that, at all times relevant hereto, Mesa was an employee of the United States of America and, while acting within the course and scope or under the color of his agency with the United States, Mesa maliciously, and/or wrongfully, and/or otherwise tortuously shot Decedent Sergio Adrián Hernández Güereca even though he showed no resistance to the Agent's demands, thereby causing Sergio Adrián Hernández Güereca's untimely death.

3. Defendants Ramiro Cordero, former United States Border Patrol Special Operations Supervisor, El Paso

Sector; Scott A. Luck, United States Border Patrol, El Paso Sector; and Carla L. Provost, United States Border Patrol Deputy Chief Patrol Agent, El Paso Sector, through their own individual actions, violated Decedent's constitutional rights as guaranteed by the Fourth and Fifth Amendments by tolerating and condoning a pattern of brutality and excessive force by Border Patrol agents; systematically failing to properly and adequately monitor and investigate incidents of brutality or supervise and discipline officers involved in such misconduct; creating an environment to shield agents from liability for their wrongful conduct; and inadequately training officers and agents regarding the appropriate use and restraint of their firearms as weapons. Defendants had actual and/or constructive knowledge that the conduct of their subordinate, Mesa, posed pervasive and unreasonable risk of constitutional injury to Decedent and their response to that knowledge was so inadequate as to show deliberate indifference or tacit authorization of alleged offensive practices. Defendants' failure to safeguard against constitutional transgressions by Mesa constitutes an actionable wrong under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny.

4. Plaintiffs have/will effectuated service of process on Defendants in their individual capacities pursuant to Fed. R. Civ. P. 4(i)(2), by sending a copy of the summons and Third Amended Complaint via certified mail, return receipt requested, to the following:

(1) RamiroCordero
2132 E. Glen Dr.
El Paso, Texas 79936-3862

(2) ScottA.Luck
3700 Hueco Valley Dr. Apt 203
El Paso, Texas 79938-5410

(3) Victor Manjarrez, Jr.
12325 Tierra Limpia Dr.
El Paso, Texas 79938-4501

(4) JesusMesa,Jr.
C/O Randy Ortega
609 Myrtle, Suite 100
El Paso, Texas 79901

(5) Carla Provost
6390 Franklin View Dr.
El Paso, Texas 79912-8147

JURISDICTION

5. The jurisdiction of this Court is based on 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny.

VENUE

6. As more fully set forth herein, Plaintiffs contend that Defendant Mesa's acts occurred on the United States side of the Rio Grande River in El Paso, Texas, in El Paso County, located on the border of the United States and Ciudad Juárez, Mexico. Defendants Cordero, Luck, Manjarrez, and Provost's actions and omissions occurred in El Paso, Texas. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b).

CONDITIONS PRECEDENT

7. All conditions precedent have been satisfied prior to filing this suit.

PARTIES

8. At all times relevant hereto, Plaintiff Jesus Hernández Güereca was, and now is, a citizen of the Republic of Mexico.

9. At all times relevant hereto, Plaintiff María Guadalupe Güereca Bentacour was, and now is, a citizen of the Republic of Mexico.

10. At all times relevant hereto, Decedent Sergio Adrián Hernández Güereca was a citizen of the Republic of Mexico.

11. At all times relevant hereto, Plaintiff Jesus Hernández Güereca individually as the surviving father of Decedent, and as Successor-in-Interest to the Estate of Decedent, may maintain a Federal Wrongful Death and Survival Action and recover damages for the value of the Decedent's life and the Decedent's pain and suffering.

12. At all times relevant hereto, Plaintiff María Guadalupe Güereca Bentacour individually as the surviving mother of Decedent, and as Successor-in-Interest to the Estate of Decedent, may maintain a Federal Wrongful Death and Survival Action and recover damages for the value of the Decedent's life and the Decedent's pain and suffering.

13. At all times relevant hereto, Defendants Cordero, Luck, Mesa, and Provost were and/or are investigative or law enforcement officers for the United States Border Patrol, acting within the course and scope of their employment, or under the color of such employment, with the United States of America.

14. Plaintiffs believe and thereupon allege that, at all times relevant hereto, Mesa was acting within the course and scope of his employment with the Defendant the United States of America and/or other Defendants on

June 7, 2010, when Decedent was wrongfully shot to death.

15. Plaintiffs believe and thereupon allege that, at all times relevant hereto, the United States Bureau of Customs and Border Protection was, and is, a subdivision of the United States Department of Homeland Security—a United States Federal Governmental entity with headquarters in Washington, D.C., and various branch offices throughout the country including this judicial district.

General Factual Allegation Applicable to All Claims for Relief

16. Monday, June 7, 2010 reached a high of 109 degrees in El Paso, Texas. Sergio Adrián Hernández Güereca was spending the last few minutes of the day together with his friends in the all-but-dry cement culvert separating the sister countries of Mexico and the United States. Similar to the Native American Indian game "counting coup," Sergio and his friends would physically run up and touch the barbed-wire United States high fence, and then scamper back down the incline. They had no interest in entering the United States. Rather, in a scene as old as time, a group of young boys were simply ending their day laughing and playing under the gathering clouds of a evening summer thunderstorm, before heading back home for dinner and bed.

17. Suddenly, a United States Border Agent, Jesus Mesa, Jr., aka Jesus Meza, Jr., emerged on his bicycle and detained one of the individuals, dragging the young boy along the concrete. Sergio retreated and stood still beneath the pillars of the Paso del Norte Bridge, observing. US Border Patrol Agent Jesus Mesa, Jr., aka Jesus Meza, Jr., then stopped, pointed his weapon across

the border, seemingly taking careful aim, and squeezed the trigger at least twice, fatally wounding Sergio with at least one gunshot wound to the face. Sergio, who had been standing safely and legally on his native soil of Mexico, unarmed and unthreatening, lay dead on his back in his blue jeans and sneakers. He was fifteen years old.

18. More US Border Patrol agents arrived briefly, the shooter, Agent Jesus Mesa, Jr., aka Jesus Meza, Jr., picked up his bicycle, and then they all left. No one took any action to render emergency medical aid to Sergio, leaving him dead or dying beneath Paso del Norte Bridge in the Territory of Mexico. Shortly thereafter, Mexican police arrived on scene and pronounced Sergio dead.

19. Almost immediately, FBI spokeswoman Andrea Simmons, prior to discovering the existence of a disturbing video depicting much of the event, issued a false and reprehensible cover-up statement:

> "This agent, who had the second subject detained on the ground, gave verbal commands to the remaining subjects to stop and retreat. However, the subjects surrounded the agent and continued to throw rocks at him. The agent then fired his service weapon several times, striking one subject who later died."

20. This litigation arises from the acts and omissions of the named Defendants acting in concert in their individual capacities, as appropriately pled herein.

21. Plaintiffs further contend that Defendants are individually, jointly, and severally liable for those violations of Decedent's constitutional rights, referenced above and below, in that Defendants have:

(1) tolerated, condoned, and encouraged a pattern of brutality and use of excessive force by members of the United States Department of Homeland Security, United States Bureau of Customs and Border Protection, United States Border Patrol, United States Immigration and Customs Enforcement Agency, and/or United States Department of Justice against citizens from Mexico and Central or South America;

(2) systematically failed to properly and adequately monitor and investigate such incidents and to supervise and discipline the officers involved;

(3) created an environment and culture in which officers and agents are encouraged to shield the misconduct of fellow officers, whereby officers and agents believe they can violate without legal consequence and with impunity the rights of persons such as Decedent;

(4) inadequately trained officers and agents regarding the proper restraint and use of firearms as weapons; and

(5) inadequately elected, trained, monitored, and supervised officers and agents.

FIRST CLAIM FOR RELIEF:
ADOPTION OF POLICIES THAT VIOLATED DECEDENT'S FOURTH AND FIFTH AMENDMENT RIGHTS

22. Plaintiffs repeat and incorporate above paragraphs 1 through 21 inclusive, as though fully set forth in this paragraph 22.

23. Plaintiffs allege that, at all times relevant hereto, Defendants Cordero, Luck, Manjarrez, and Provost,

while acting in their respective official capacities, exercised supervision and control over Defendant Mesa. Such Defendants were acting under color of law as law enforcement officers and employees of the United States Government.

24. Plaintiffs allege that such supervisorial Defendants, acting in their respective individual capacities, were authorized final policy-makers. In such capacities, they adopted, acquiesced to, or ratified official customs, policies, procedures, and decisions, including training programs, which they knew, or should have known, were inadequate regarding the use of deadly force. The inadequacy of such official customs, policies, procedures, and decisions, including training programs, directly and proximately caused Defendant Mesa to use unreasonable, unconstitutional, and excessive force, i.e. deadly force, in effecting the arrest of Decedent. The use of such force deprived Decedent of his Fourth and Fifth Amendment rights to be free from unreasonable search and seizure. The inadequacy of such customs, policies, procedures, and decisions, including training programs, manifested a deliberate indifference to the protection of Decedent's constitutional rights and was the moving force, which resulted in the deprivation of Decedent's constitutional rights.

25. As a direct and proximate result of the acts or omissions of such Defendants, Decedent was killed, giving rise to the injuries and damages for which Plaintiffs now complain.

SECOND CLAIM FOR RELIEF: FAILURE TO ADOPT POLICIES WHICH RESULTED IN THE VIOLATION OF DECEDENT'S FOURTH AND FIFTH AMENDMENT RIGHTS

26. Plaintiffs repeat and incorporate above paragraphs 1 through 22, inclusive, as though fully set forth in this paragraph 26.

27. Plaintiffs allege that, at all times relevant hereto, Defendants Cordero, Luck, Manjarrez, and Provost, while acting in their respective official capacities, exercised supervision and control over Defendant Mesa. Such Defendants were acting under color of law as law enforcement officers and employees of the United States Government.

28. Plaintiffs allege that such supervisorial Defendants, acting in their espective individual capacities, were authorized final policy-makers who failed to adopt or ratify official customs, policies, procedures, and decisions, including training programs, regarding the use of reasonable force in effecting arrests. Such failure directly and proximately caused Defendant Mesa to use unreasonable, unconstitutional, and excessive force, i.e. deadly force, in effecting the arrest of Decedent. The use of such force deprived Decedent of his Fourth and Fifth Amendment rights to be free from unreasonable search and seizure. The failure to adopt such customs, policies, procedures, and decisions, including training programs, directly and proximately resulted in Decedent being shot by Defendant Mesa. The failure to adopt such customs, policies, procedures, and decisions, including training programs, manifested a deliberate indifference to the protection of Decedent's constitutional rights and was the moving force, which resulted in the deprivation of Decedent's constitutional rights.

29. As a direct and proximate result of the acts or omissions of such Defendants, Decedent was killed, giving rise to the injuries and damages for which Plaintiffs now complain.

THIRD CLAIM FOR RELIEF:
VIOLATION OF FOURTH AND FIFTH AMENDMENT RIGHTS BY JESUS MESA, JR., AKA JESUS MEZA, J

30. Plaintiffs repeat and incorporate above paragraphs 1 through 22, inclusive, as though fully set forth in this paragraph 30.

31. Plaintiffs allege that Defendant Mesa shot Decedent on June 7, 2010, while acting individually under color of law as an employee of the United States of America, United States Department of Homeland Security, United States Bureau of Customs and Border Protection, United States Border Patrol, United States Immigration and Customs Enforcement Agency, and/or United States Department of Justice while attempting to apprehend him in El Paso, Texas on suspicion of illegal entry into the United States.

32. Plaintiffs allege that in shooting Decedent, Mesa acted unreasonably by using excessive, deadly force against Decedent in violation of the Fourth and Fifth Amendments of the United States Constitution. At the time of the shooting, Decedent was unarmed and presented no physical threat to Mesa.

33. Plaintiffs allege that Mesa's shooting of Decedent evidences Mesa'a callous disregard for, and deliberate indifference to, Decedent's constitutional rights.

34. As a direct and proximate result of the acts or omissions of Mesa, Decedent was killed, giving rise to the injuries and damages for which Plaintiffs now complain.

WHEREFORE, Plaintiffs pray for judgment against all named and unnamed Defendants as follows:

A. Damages as allowed on each Claim for Relief in an amount according to proof at the time of trial;

B. All together with any interest, pre-and-post judgment, costs and disbursements; and

C. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

By: s/ Robert C. Hilliard

CERTIFICATE OF SERVICE

On August 22, 2011, I certify that a copy of the above and foregoing was served on all counsel of record identified below in accordance with the Federal Rules of Civil Procedure.

By: /s/ Robert C. Hilliard
Robert C. Hilliard

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Attorney for Jesus Mesa, Jr a/k/a Jesus Meza, Jr.

APPENDIX G

United States District Court
for the District of Arizona

No. 4:14-CV-02251-RCC

Araceli Rodriguez,
Plaintiff,

v.

Lonnie Swartz,
Defendant.

ORDER

INTRODUCTION

This case calls on the Court to answer two challenging questions: 1) whether a Mexican national standing on the Mexican-side of the United States and Mexico border at the time of the alleged violation can avail himself of the protections of the Fourth and Fifth Amendments of the United States Constitution when a U.S. Border Patrol agent standing in the United States uses excessive force against him; and 2) whether a U.S. Border Patrol agent may assert qualified immunity based on facts he found out after the alleged violation.

Specifically before the Court are Plaintiff Araceli Rodriguez' First Amended Complaint ("FAC") (Doc. 18), Defendant Lonnie Swartz' Fed.R.Civ.P. Rule 12(b)(6) Motion to Dismiss (Doc. 30), Rodriguez' Response (Doc. 46), and Swartz' Reply (Doc. 49). The Court heard oral arguments on this matter on May 26, 2015. For the reasons stated below, the Court grants in part and denies in part Swartz' Motion to Dismiss.

BACKGROUND

The Court sets forth the following factual background and hereby imparts that these statements are reiterations of Rodriguez' allegations which may or may not be a complete and accurate rendition of the facts of this case. *See* (Doc. 18). At this stage in the proceedings, Swartz has made no concessions as to the veracity of Rodriguez' allegations nor presented any contravening facts; such facts are not required when filing a Rule 12(b)(6) motion to dismiss.

1. Rodriguez brings this suit on behalf of her deceased minor son, J.A. (Doc. 18 at ¶¶ 3, 6).
2. On the night of October 10, 2012, J.A. was walking home alone down the sidewalk of Calle Internacional, a street that runs alongside the border fence on the Mexican side of the border between the United States and Mexico. (Doc. 18 at ¶ 9).
3. According to an eyewitness who was walking behind J.A. that night, a Border Patrol agent stationed on the U.S. side of the fence, now known to be Swartz, opened fire. According to various reports, Swartz fired anywhere from 14 to 30 shots. Upon information and belief, Swartz did

not issue any verbal warnings before opening fire. (Doc. 18 at ¶ 10).

4. J.A. was shot approximately ten times and collapsed where he was shot. Virtually all of the shots entered his body from behind. Upon information and belief, no one else was shot. (Doc. 18 at ¶¶ 11-13).

5. Immediately prior to the shooting, J.A. was visible and not hiding—he was peacefully walking down the street by himself. Eyewitnesses state that he did not pose a threat and was not committing a crime, throwing rocks, using a weapon or threatening U.S. Border Patrol agents or anyone else prior to being shot. (Doc. 18 at ¶ 14).

6. At the moment he was shot, J.A. was walking on the southern side of Calle Internacional, directly across the street from a sheer cliff face that rises approximately 25 feet from street level. The cliff is approximately 30 feet from where J.A. was standing when shot. The border fence, which is approximately 20- 25 feet tall, runs along the top of the cliff. Thus, at the location where J.A. was shot, the top of the fence towards approximately 50 feet above street level on the Mexican side. The fence itself is made of steel beams that are 6.5 inches in diameter. Each beam is approximately 3.5 inches apart from the next. (Doc. 18 at ¶ 15).

7. At the time of the shooting, J.A. lived in Nogales, Sonora, Mexico, approximately four blocks from where he was shot. Because J.A's mother (Plaintiff, Araceli Rodriguez) was away for work, J.A.'s grandmother often visited Nogales, Mexico to care for him. J.A.'s grandmother and

grandfather live in Arizona and were lawful permanent residents of the United States at the time of the shooting. They are now U.S. citizens. (Doc. 18 at ¶ 17).

8. Swartz fired from the U.S. side of the fence. Swartz acted under color of law when shooting J.A. Upon information and belief, Swartz did not know whether J.A. was a U.S. citizen or whether J.A. had any significant contacts with the United States. (Doc. 18 at ¶¶ 17, 19).

9. J.A.'s killing by Swartz is not a unique event, but part of a larger pattern of shootings by Border Patrol agents in Nogales and elsewhere. (Doc. 18 at ¶ 20).

10. 10.The U.S.-Mexico border area of Mexico is unlike other areas of Mexico. U.S. Border Patrol agents not only control the U.S. side of the fence, but through the use of force and assertion of authority, also exert control over the immediate area on the Mexican side, including where J.A. was shot. (Doc. 18 at ¶ 21).

11. 11.U.S. control of the Mexican side of the border fence in Nogales and other areas along the Southern border is apparent and longstanding, and recognized by persons living in the area. (Doc. 18 at ¶ 22).

12. 12.Border Patrol agents use guns, non-lethal devices and other weapons, as well as military equipment and surveillance devices to target persons on the Mexican side of the border. For example, U.S. surveillance cameras are mounted along the border fence, monitoring activity on the Mexican side of the fence. Additionally, Border Patrol agents have opened fire into Nogales from the U.S. side on prior occasions and are known to

launch non-lethal devices such as pepper spray canisters into Nogales neighborhoods from the U.S. side of the border fence. (Doc. 18 at ¶ 23).

13. 13.U.S. Border Patrol agents exercise control over areas on the Mexican side of the border adjacent to the international border fence. U.S. Border Patrol agents make seizures on the Mexican side of the fence. U.S. Bureau of Customs and Border Protection officials are authorized to be on Mexican soil to conduct pre-inspection of those seeking admission to the United States. U.S. Border Patrol helicopters fly in Mexican airspace near the border and swoop down on individuals. (Doc. 18 at ¶ 24).

14. 14.The Chief of the U.S. Border Patrol has acknowledged that U.S. border security policy "extends [the United States'] zone of security outward, ensuring that our physical border is not the first or last line of defense, but one of many." *Securing Our Borders—Operation Control and the Path Forward: Hearing Before the Subcomm. on Border and Maritime Security of the H. Comm. on Homeland Security*, 112th Cong. 8 (2011) (prepared by Michael J. Fisher, Chief of U.S. Border Patrol). (Doc. 18 at ¶ 24).

LEGAL STANDARD

"On a motion to dismiss under Rule 12(b)(6), a court must assess whether the complaint 'contains sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Chavez v. U.S.*, 683 F.3d 1102, 1108 (9th Cir. 2012) (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 678; *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the

reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1108-09; see also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322- 23 (2007). In determining plausibility, the court must accept as true all material factual allegations in the complaint, construe the pleadings in the light most favorable to the plaintiff and make any reasonable inferences therefrom. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). A court may dismiss a claim if a successful affirmative defense appears clearly on the face of the pleadings. *Jones v. Bock*, 549 U.S. 199, 215 (2007).

DISCUSSION

I. *Bivens*, the extraterritorial application of the U.S. Constitution and qualified immunity

Rodriguez asserts her claims against Swartz in his individual capacity for deprivation of J.A.'s constitutional rights under the Fourth and Fifth Amendments to the United States Constitution. (Doc. 18 at p.8). *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court of the United States held that money damages may be recovered against a federal official for violation of a plaintiff's constitutional rights. In order to successfully allege a *Bivens* claim, a plaintiff must plead factual matter demonstrating that he was deprived of a clearly established constitutional right. *Iqbal*, 556 U.S. at 666.

Swartz argues that Rodriguez cannot state a claim that J.A. was deprived of a constitutional right because J.A., a Mexican citizen without substantial voluntary connections to the United States and standing on Mexican soil at the time of the alleged violation, is not entitled to the protections of the Fourth and Fifth

Amendments of the United States Constitution. Should this Court hold that J.A. was protected by either or both Amendments, Swartz asserts that he is entitled to qualified immunity because J.A.'s rights pursuant to the Fourth or Fifth Amendments were not clearly established at the time of the alleged violation.

Rodriguez responds by arguing that this Court need not analyze this case as an extraterritorial application of the United States Constitution because Swartz' conduct took place entirely within the United States. Should the Court consider the extraterritorial application of the Constitution, Rodriguez asserts that J.A. was protected by both the Fourth and Fifth Amendments even while on Mexican soil. Rodriguez further avers that Swartz should not be entitled to qualified immunity because he knew it was a crime to fatally shoot a Mexican citizen across the border without justification, and because Swartz did not know J.A.'s legal status or citizenship when he shot J.A., such that qualified immunity should not apply post-hoc Swartz' awareness of J.A.'s citizenship.

II. *Hernandez v. United States et al.* is persuasive, not controlling, authority

The parties' arguments before this Court are framed in reference to *Hernandez v. United States*, 757 F.3d 249 (5th Cir. 2014), a case with very similar arguments to those now before the Court:

On June 7, 2010, Sergio Adrian Hernandez Guereca, a fifteen-year-old Mexican national, was on the Mexican side of a cement culvert that separates the United States from Mexico. *Id.* at 255. Sergio had been playing a game with his friends that involved running up the incline of the culvert, touching the barbed-wire fence separating Mexico and the United States, and then running back

down the incline. *Id.* U.S. Border Patrol Agent Jesus Mesa, Jr. arrived on the scene and detained one of Sergio's friends, causing Sergio to retreat and hide behind the pillars of a bridge on the Mexican side of the border. *Id.* Mesa, still standing in the United States, then fired at least two shots at Sergio, one of which struck Sergio in the face and killed him. *Id.*

Sergio's parents filed suit against the United States, unknown federal employees, and Mesa. *Id.* Similarly to the case before this Court, the claim against Mesa was made pursuant to *Bivens* for violations Sergio's Fourth and Fifth Amendment rights through the use of excessive, deadly force. *Id.* Mesa moved to dismiss the claims against him asserting qualified immunity and arguing that Sergio, as an alien injured outside the United States, lacked Fourth or Fifth Amendment protections. *Id.* at 256. The U.S. District Court for the Western District of Texas agreed and dismissed the claims against Mesa. *Id.* Sergio's parents appealed.

A divided three judge panel of the Court of Appeals for the Fifth Circuit held that in Sergio's case when, "an alleged seizure occur[s] outside of [the U.S.] border and involving a foreign national—the Fourth Amendment does not apply." *Id.* at 267. Nevertheless, the panel majority also held "that a noncitizen injured outside the United States as a result of arbitrary official conduct by a law enforcement officer located in the United States may invoke the protections provided by the Fifth Amendment." *Id.* at 272. The panel further found that *Bivens* extends to an individual located abroad who asserts the Fifth Amendment right to be free from gross physical abuse against federal law enforcement agents located in the United States based on their conscience-shocking, excessive use of force across our nation's borders. *Id.* at 277. Finally, the panel held that the facts

alleged in the complaint defeated Mesa's claim of qualified immunity stating: "It does not take a court ruling for an official to know that no concept of reasonableness could justify the unprovoked shooting of another person." *Id.* at 279-80 (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

Upon Mesa's motion, the Fifth Circuit Court of Appeals agreed to rehear *Hernandez* en banc. 771 F.3d 818 (5th Cir. 2014). In a per curiam decision, a unanimous Fifth Circuit Court of Appeals affirmed the district court's dismissal of both counts against Mesa holding that Sergio's parents failed to allege a violation of the Fourth Amendment, and that Sergio's Fifth Amendment rights were not "clearly established" when he was shot. *Hernandez v. United States et al.*, --- F.3d --- (5th Cir. April 24, 2015); 2015 WL 1881566, at *1. In holding Sergio's Fifth Amendment rights were not "clearly established," the Fifth Circuit Court of Appeals gave allegiance to the general rule of constitutional avoidance and bypassed the issue of whether Sergio was entitled to constitutional protection as a noncitizen standing on foreign soil. *Id.* at *2. At least three judges wrote concurring opinions on the matter—each attempting to reconcile and apply various Supreme Court holdings (including *Johnson v. Eisentrager*, 399 U.S. 763 (1950);*Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); and *Boumediene v. Bush*, 553 U.S. 723 (2008)) to facts unique to the Fifth or any other circuit.

Swartz urges the Court to follow the Fifth Circuit Court of Appeals' en banc decision and dismiss both of Rodriguez' claims based on theories of constitutional extraterritoriality and qualified immunity. Rodriguez avers that *Hernandez* was wrongly decided and holds no precedential value in this Circuit. The Court agrees that

Hernandez is not controlling authority in this circuit. All the same, the Court has been guided by the thorough historical and legal analysis of the complex issues addressed in the Fifth Circuit Appellate judges' opinions and utilized the *Hernandez* decisions as a frame of reference. Nevertheless, while *Hernandez* shares many similar arguments to the case at hand, this Court evaluates Rodriguez' case on the facts alleged in her First Amended Complaint, on the arguments made by the parties' in their pleadings, and in light of the Ninth Circuit Court of Appeal's applicable and controlling case law. Applying this Circuit's case law to the facts of this specific case, this Court respectfully disagrees with the Fifth Circuit Court of Appeals and arrives at a different conclusion as outlined below.

III. J.A.'s seizure occurred in Mexico

The Court begins with Rodriguez' contention that there is no need to analyze J.A.'s seizure as an extraterritorial application of the constitution because Swartz' conduct occurred entirely within the United States. To support her position, Rodriguez cites to use the language in footnote sixteen of *Wang v. Reno*, 81 F.3d 808, 818 n.16 (9th Cir. 1996) stating that the government's conduct in the United States can constitute a violation abroad. However, the Court in *Wang* clearly stated that "[t]he deprivation [of Wang's due process rights] occurred on American soil when Wang was forced to take the witness stand," and that the actions taken while Wang was abroad were "inextricably intertwined with the ultimate violation." *Id.* Such is not the same in the present case where the ultimate violation, J.A.'s seizure, occurred entirely in Mexico.

A seizure occurs "only when there is a governmental termination of freedom of movement..." *Brower v. Cnty*

of Inyo, 489 U.S. 593, 596-97 (1989). In this case, J.A. was not seized when Swartz shot at him, but when the bullets entered J.A.'s body and impeded further movement. As such, any constitutional violation that may have transpired materialized in Mexico. Accordingly, the Court now turns to the question of whether the Fourth and/or Fifth Amendments of the United States Constitution protect J.A. outside the United States.[1]

IV. Rodriguez' claim that Swartz violated J.A.'s Fourth Amendment rights survives

A. Both Boumediene and Verdugo-Urquidez apply

The Supreme Court of the United States "has discussed the issue of the Constitution's extraterritorial application on many occasions." *Boumediene*, 553 U.S. at 755-71. However, it was not until 2008's *Boumediene v. Bush* that the Supreme Court held for the first time that noncitizens detained by the United States government in territory over which another country maintains de jure sovereignty have any rights under the United States Constitution. *Id.* at 771 (addressing whether the Suspension Clause has full effect at Naval Station in Guantanamo Bay in case where aliens detained as enemy combatants sought the Writ of Habeas Corpus).

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[1] The Court also rejects as unpersuasive Rodriguez' argument pursuant to *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987): that judicial proceedings, and therefore, any government actions that could violate the litigants' rights take place inside the United States. *Asahi* focused on when a state court could exercise personal jurisdiction over a foreign corporation. Jurisdiction is not at issue in this case.

In their pleadings, the parties disagree as to which standard the Court should apply to decide whether the Fourth and Fifth Amendments of the United States Constitution apply in this case. Swartz argues that *Boumediene* is limited to the Suspension Clause and inapplicable in the present case. Further, Swartz avers that the "voluntary connections" test announced in *Verdugo-Urquidez*' controls Rodriguez' Fourth Amendment claim. *Verdugo-Urquidez*, 494 U.S. at 261, 271 (holding that the Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a nonresident and located in a foreign country where nonresident had no voluntary connection to the United States). Rodriguez responds that *Verdugo-Urquidez*' "voluntary connections" test was repudiated by the Supreme Court in *Boumediene* where the Court applied a "general functional approach" and "impracticable and anomalous" standard when determining the extraterritoriality of the United States Constitution. 553 U.S. at 755-72.

The Fifth Circuit Court of Appeals grappled with this very question in addressing *Hernandez* and decided to apply *Verdugo-Urquidez*' "sufficient connections requirement" in light of *Boumediene*'s "general functional approach" as to the Fourth Amendment claim. *Hernandez*, 757 F.3d at 266. In arriving at this conclusion, the Fifth Circuit Court of appeals rejected 1) Defendant Mesa's argument that the Constitution does not guarantee rights to foreign nationals injured outside the sovereign territory of the United States, 2) the district court's finding that *Boumediene* was limited to the Suspension Clause, and 3) the plaintiffs' argument that the Court should ignore *Verdugo- Urquidez* in light of *Boumediene*. *Id.* at 260, 262, and 265. Applying both standards, the appellate court considered the fact that Hernandez lacked: American citizenship, territorial

presence in the United States, interest in entering the United States, acceptance of societal obligations, and sustained connections to the United States. *Id.* Additionally, the Court weighed several practical considerations in determining whether Hernandez was protected by the Fourth Amendment including the uniqueness of the border. *Id.* at 266-67 (discussing the limited application of the Fourth Amendment during searches at the border, national self-protection interests, the increase of Border Patrol agents at the southwest border, and the use of sophisticated surveillance systems). Ultimately, the appellate court found that Hernandez was not entitled to the protections of the Fourth Amendment based on the facts alleged.

The Ninth Circuit Court of Appeals similarly determined that both *Boumediene's* "functional approach" factors and *Verdugo-Urquidez'* "significant voluntary connection" test applied in the case of a woman seeking to assert her rights under the First and Fifth Amendments of the United States Constitution. *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 994-97 (9th Cir. 2012). The Court found a comparison of Ibrahim's case with *Verdugo-Urquidez*, *Eisentrager*, and *Boumediene* instructive in rejecting the government's bright-line "formal sovereignty-based" test and in holding that the plaintiff had established voluntary connections to the United States during her studies at an American university. *Id.* at 995-97. Similarly, this Court finds an analysis of these cases instructive in finding that both *Boumediene*'s functional approach factors and *Verdugo- Urquidez* "voluntary connections" test apply in this case.

In 1950's *Eisentrager*, the Supreme Court of the United States found that German citizens who had been arrested in China, convicted of violating the laws of war

after adversary trials before a U.S. military tribunal in China, and sent to a prison in Germany to serve their sentences did not have the right to seek the Writ of Habeas Corpus under the United States Constitution. 339 U.S. at 770-77 (considering (a) petitioners' status as enemy aliens; (b) lack of previous territorial presence or residence in the United States; (c) capture and custody by U.S. military as prisoners of war; (d) convictions by Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; and (f) at all times imprisoned outside the United States.)

In 1990's *Verdugo-Urquidez*, a Mexican-national was extradited from Mexico to face drug charges in the United States. 494 U.S. at 262. While awaiting trial, American law enforcement agents working with Mexican authorities performed a warrantless search of Verdugo-Urquidez' Mexican residences and seized various incriminating documents. *Id.* The criminal defendant sought to suppress this evidence and alleged violations of his Fourth Amendment rights. *Id.* at 263. The Supreme Court of the United States considered the text and history of the Fourth Amendment, as well as Supreme Court cases discussing the application of the Constitution to aliens extraterritorially. The Supreme Court found that under the circumstances (where Verdugo-Urquidez was a citizen and resident of Mexico with no voluntary attachment to the United States and the place to be searched was located in Mexico), the Fourth Amendment had no application. *Id.* at 274-75. Concurring in the opinion, Justices Kennedy and Stevens each wrote separately to address the fact that applying the Warrant Clause to searches of noncitizens' homes in foreign jurisdictions would be impractical and anomalous due to practical considerations. *Id.* at 275-79.

In 2008's *Boumediene*, the plaintiffs were aliens who had been designated as enemy combatants, were detained at the United States Naval Station in Guantanamo Bay, Cuba, and sought the Writ of Habeas Corpus. 553 U.S. at 732. The government argued that because of their status as enemy combatants and their physical location outside the sovereignty of the United States, they had no constitutional rights and no privilege to Habeas Corpus. *Id.* at 739. The Supreme Court rejected the government's argument instead finding that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764. In so holding, *Boumediene* addressed both *Eisentrager* and *Verdugo-Urquidez* and found both of these decisions to stand for the proposition that the extraterritorial reach of the constitution depends upon "practical considerations" including the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it" and in particular, whether judicial enforcement of the provision would be "impracticable and anomalous." *Id.* at 759-66.

In *Ibrahim*, the Court of Appeals for the Ninth Circuit considered that Ibrahim was unlike the plaintiffs in *Eisentrager*—she had not been convicted of, or even charged with violations of any law. 669 F.3d at 996. On the other hand, Ibrahim shared an important similarity with the plaintiffs in *Boumediene*—she sought the right to assert constitutional claims in a civilian court in order to correct what she contended was a mistake. *Id.* at 997. Here, J.A. was also unlike the plaintiffs in *Eisentrager*—he had not been charged with or convicted of violating any law. Similarly to the plaintiffs in *Boumediene*, J.A. was on foreign soil when he was seized by American forces and now seeks to assert that his seizure was unlawful. Per this Circuit's precedent in *Ibrahim* and the Supreme Court's reasoning in *Boumediene*, this Court

sees no reason why *Boumediene* should not apply in this case. Because *Verdugo-Urquidez* has not been overruled and considers the Fourth Amendment explicitly, this Court finds that it must also apply the "voluntary connections" test. In sum, this Court finds most appropriate to apply the "practical considerations" outlined in *Boumediene* in conjunction with *Verdugo-Urquidez*' "voluntary connections" test to evaluate whether J.A. was protected by the Fourth Amendment.

B. The facts alleged in this case weigh in favor of establishing that J.A. was entitled to the protections of the Fourth Amendment of the U.S. Constitution

The Supreme Court stated three factors relevant to determining the extraterritorial application of the Constitution (specifically the Suspension Clause) in *Boumediene*: (1) the citizenship and status of the claimant, (2) the nature of the location where the constitutional violation occurred, and (3) the practical obstacles inherent in enforcing the claimed right. 553 U.S. at 766-71. The relevant obstacles included, but were not limited to, the consequences for U.S. actions abroad, the substantive rules that would govern the claim, and the likelihood that a favorable ruling would lead to friction with another country's government. *Id.* at 766. The Court considers these along with the "voluntary connections" test outlined in *Verdugo-Urquidez* to find that Rodriguez can assert J.A.'s rights pursuant to the Fourth Amendment.

To begin, the Court considers J.A.'s citizenship, status, and voluntary connections to the United States. J.A. was a sixteen-year-old Mexican citizen. *See* Doc. 18 at ¶¶ 1-2. At the time Swartz seized him, J.A. was not suspected of, charged with, or convicted of violating any law. Just prior to the shooting, J.A. was visible and not

hiding. *Id.* at ¶14. Observers stated that he did not pose a threat, but was peacefully walking down the street. *Id.* He was not committing a crime, nor was he throwing rocks, using a weapon, or in any way threatening U.S. Border Patrol agents or anyone else. *Id.* Further, J.A. was not a citizen of a country with which the United States are at war, nor was he engaged in an act of war or any act that would threaten the national security of the United States. *Id.* Thus, J.A.'s status was that of a civilian foreign national engaged in a peaceful activity in another country, but within the U.S.'s small-arms power to seize. The Court here finds that while J.A.'s nationality weighs against granting him protection pursuant to the Fourth Amendment, his status as a civilian engaged in peaceful activity weighs in favor of granting him protection despite the fact that J.A. was in the territory of another country when he was seized.

As to substantial voluntary connections to the United States, this Court finds that J.A. had at least one. J.A. and his family lived within the region formerly called "ambos Nogales," or "both Nogales," referring to the adjacent towns of Nogales, Arizona and Nogales, Sonora—once adjacent cities flowing into one-another, now divided by a fence. *Id.* at ¶ 17. In particular, J.A. had strong familial connections to the United States. Both his grandparents were legal permanent residents (now citizens) of the United States residing in Nogales, Arizona. *Id.* J.A.'s grandmother would often cross the border into Mexico to care for J.A. while his mother worked. *Id.* Further, J.A.'s home in Nogales, Sonora, Mexico was within four blocks' distance from the U.S.-Mexico border. *Id.* Living in such proximity to this country, J.A. was likely well-aware of the United States' (and specifically the U.S. Border Patrol's) *de facto* control and influence over Nogales, Sonora, Mexico. *Id.* at ¶¶ 17, 21-24.

The Court here considers these same factors in assessing the nature of the location where the alleged constitutional violation occurred.[2] Specifically, the Court considers Rodriguez' factual allegations that the U.S.-Mexico border is unlike other areas of Mexico. *Id.* at ¶¶ 21-24. "U.S. Border Patrol agents not only control the U.S. side of the fence, but through the use of force and assertion of authority, they also exert control over the immediate area on the Mexican side, including where J.A. was shot." *Id.* at ¶ 21. "U.S. control of the Mexican side of the border fence in Nogales and other areas along the Southern border is apparent and longstanding, and recognized by persons living in this area." *Id.* at ¶ 22. "Border patrol agents use guns, non-lethal devices and other weapons, as well as military equipment and surveillance devices to target persons on the Mexican side of the border....Border Patrol agents have opened fire into Nogales from the U.S. side on prior occasions and are known to launch non-lethal devices such as pepper spray canisters into Nogales neighborhoods from the U.S. side of the border fence. By shooting individuals on the Mexican side of the border area, the United States, through Border Patrol, controls the area immediately adjacent to the international border fence on the Mexican side. This control extended to the street, Calle Internacional, where J.A. was killed." *Id.* at ¶ 23. The Court finds this factor to weigh in favor of granting

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[2] *See Hernandez v. United States*, 757 F.3d 249, 267 (5th Cir. 2014) (outlining the scope of the U.S. Border Patrol's presence and influence along the U.S.'s southwest border with Mexico.) *See also Boumediene*, 553 U.S. at 754 ("Our cases do not hold it is improper for us to inquire into the objective degree of control the Nation asserts over foreign territory.")

J.A. constitutional protection pursuant to the Fourth Amendment.

The Court also considers the practical obstacles inherent in enforcing the claimed right. These considerations include the nature of the right asserted, the context in which the claim arises, and whether recognition of the right would create conflict with a foreign sovereign's laws and customs. *Boumediene*, 553 U.S. at 755-65. The nature of the right asserted here is the right to be free from unreasonable seizures—specifically, the fundamental right to be free from the United States government's arbitrary use of deadly force. *See* Doc. 18 at ¶¶ 35-38. The claim here arises as a lawsuit in a United States court and asks that this court apply U.S. constitutional law to the actions of a U.S. Border Patrol agent firing his weapon from within the United States. *Id.* at ¶¶ 4-5.; *Cf. Boumediene*, 553 U.S. at 759-64 (discussing practical considerations of providing plaintiffs with ability to assert their rights abroad). Rodriguez has provided documentation from the Mexican government such that there would be no conflict with Mexico's laws and customs if this Court afforded J.A. protection under the Fourth Amendment. *See* Doc. 46-1. The Court finds that these factors weigh in favor of granting J.A. protection under the Fourth Amendment.

Finally, the Court gives weight to the Supreme Court's concerns in *Verdugo- Urquidez*—that applying the Fourth Amendment to the warrantless search and seizure of a Mexican national's home in Mexico "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest" and could also plunge U.S. law enforcement and military agents "into a sea of uncertainty as to what might be reasonable in the way of searches and seizures

conducted abroad." 494 U.S. at 273-74; *see also Hernandez*, 757 F.3d at 267 (noting that extending the Fourth Amendment protections to a Mexican national on Mexican soil might carry a host of implications for U.S. Border Patrol's use of sophisticated surveillance systems (including mobile surveillance units, thermal imaging systems, unmanned aircrafts and other large- and small-scale non-intrusive inspection equipment per, *Kyllo v. United States*, 533 U.S. 27, 40 (2001))).

The Court here finds that such concerns are ameliorated by the fact that this case does not involve the Warrant Clause of the Fourth Amendment, magistrate judges, or the issuance of warrants and/or the searches and seizure of property abroad. This case addresses only the use of deadly force by U.S. Border Patrol agents in seizing individuals at and near the United States-Mexico border. U.S. Border Patrol agents are already trained in the limits of the Fourth Amendment when addressing citizens and non-citizens alike when these individuals place foot within the United States. *See, e.g.* 8 C.F.R. § 287.8(a)(2). These agents would require no additional training to determine when it is appropriate to use deadly force against individuals (whether citizens or noncitizens alike) located on the Mexican side of the United States-Mexico border.

Weighing all of the aforementioned factors, this Court finds that J.A. was entitled to protection pursuant to the Fourth Amendment. The Court acknowledges that it has arrived at a different conclusion from that of the Court of Appeals for the Fifth Circuit in *Hernandez v. U.S.*, 757 F.3d at 267. This Court respectfully disagrees with how the Circuit Court weighed some factors, but bases its decision to extend J.A. protection pursuant to the Fourth Amendment on the facts alleged in Rodriguez' First Amended Complaint and this Court's

own analysis of the relevant case law. (Doc. 18). At its heart, this is a case alleging excessive deadly force by a U.S. Border Patrol agent standing on American soil brought before a United States Federal District Court tasked with upholding the United States Constitution—that the deceased was a Mexican national standing on Mexican soil at the time the violation occurred is but one of the many practical considerations and factors the Supreme Court of the United States has ordered the lower courts to consider. Pursuant to the facts presented before this Court in Rodriguez' First Amended Complaint, the factors outlined in *Verdugo-Urquidez* and *Boumediene* weigh in favor of extending J.A. constitutional protection pursuant to the Fourth Amendment.

V. Rodriguez' claim pursuant to the Fifth Amendment is dismissed

Rodriguez' First Amended Complaint alleges that Swartz' actions violated J.A.'s Fifth Amendment guarantee of substantive due process. In his motion to dismiss, Swartz alleges that Rodriguez' Fifth Amendment claim is improperly before this Court as a substantive due process violation that is best analyzed pursuant to the Fourth Amendment.

In fact, the Supreme Court of the United States has held that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham v. Connor*, 490 U.S. 386, 395 (1989); *see also Albright v. Oliver*, 510 U.S. 266, 273 (1994); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). "Because the Fourth Amendment

provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.*

Finding both that J.A. was 'seized' and that his excessive force claim pursuant to the Fourth Amendment may proceed, this Court hereby grants Swartz' motion to dismiss Rodriguez' claim pursuant to the Fifth Amendment because Swartz conduct is more properly analyzed under the Fourth Amendment. In dismissing Rodriguez' Fifth Amendment claim, this Court does not reach Rodriguez' argument that J.A. should be entitled to protection under the Fifth Amendment's prohibition against arbitrary deprivation of life if this Court were to find that the Fourth Amendment did not protect J.A. *See* Doc. 46 at pp. 21-22.

VI. Swartz is not entitled to qualified immunity

Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Messerchmidt v. Millender*, 132 S.Ct. 1235, 1244-45, citing *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally runs on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.*

Courts are to analyze this question from the perspective "of a reasonable officer on the scene, rather

than with the 20/20 vision of hindsight" and thus allow "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396.

Qualified immunity is not merely a defense. Rather, it provides a sweeping protection from the entirety of the litigation process. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). Indeed, qualified immunity guards against the "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). When law enforcement officers are sued for their conduct in the line of duty, courts must balance between "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

Judges are to exercise their sound discretion in deciding which of the two prongs of qualified immunity analysis should be addressed first in light of the circumstances of the particular case. *Id.* at 236. The first inquiry is whether the facts demonstrate that the defendant officer violated one or more of plaintiff's constitutional rights. *Id.* If the answer is "no," the matter is concluded because without a violation there is no basis for plaintiff's lawsuit to proceed. *Id.* If the answer is "yes," the court must decide whether the right at issue was "clearly established" at the time of the alleged misconduct. *Id.* at 232. A right is clearly established where "it would be clear to a reasonable officer that his conduct was unlawful in the situation he

confronted." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (citations omitted). Qualified immunity is only applicable where both prongs are satisfied. *Pearson*, 555 U.S. at 232.

Having previously found that J.A. was protected by the Fourth Amendment, the two questions remaining before the Court are 1) whether the FAC alleges sufficient facts to establish the plausibility that Swartz violated J.A.'s constitutional right to be free from unreasonable seizures and 2) whether the right was clearly established at the time of the violation. Both of these questions are to be analyzed accepting facts alleged in Rodriguez' First Amended Complaint as true and making all reasonable inferences in favor of Rodriguez. Accordingly, the Court finds that Rodriguez alleges sufficient facts to establish the plausibility that Swartz violated J.A.'s Fourth Amendment rights. Further, the Court finds that J.A.'s rights were clearly established when Swartz seized him such that Swartz is not entitled to assert qualified immunity.

Over thirty years ago, the Supreme Court of the United States established that law enforcement officers could not use deadly force on an unarmed suspect to prevent his escape. *Brosseau v. Haugen*, 543 U.S. 194, 203 (2004) (J. Breyer concurring) ("The constitutional limits on the use of deadly force have been clearly established for almost two decades. In 1985 [the Supreme Court of the United States] held that the killing of an unarmed burglar to prevent his escape was an unconstitutional seizure.") (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). This means that for over thirty years, law enforcement officers have been well-aware that it is unlawful (and in violation of an individual's Fourth Amendment rights to be free from unreasonable seizures) to use deadly force against an

unarmed suspect to prevent his escape. Additionally, officers are also aware that in "obvious cases" rights can be "clearly established" even without a body of relevant case law. *See Hope*, 536 U.S. at 738 (citing *U.S. v. Lanier*, 520 U.S. 259, 270- 271 (1997)).

The facts alleged in the First Amended Complaint are that J.A. was peacefully walking home and was not engaged in the violation of any law or threatening anyone when Swartz shot him at least ten times. (Doc. 18 at ¶¶ 10, 14). As alleged in Rodriguez' First Amended Complaint, this is not a case involving circumstances where Swartz needed to make split-second judgment—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. Instead, the facts alleged in the First Amended Complaint, demonstrate an "obvious case" where it is clear that Swartz had no reason to use deadly force against J.A.

Swartz attempts to differentiate this case from other deadly force cases by alleging that at the time he shot J.A., it was not clearly established whether the United States Constitution applied extraterritorially to a non-citizen standing on foreign soil. Yet, at the time he shot J.A., Swartz was an American law enforcement officer standing on American soil and well-aware of the limits on the use of deadly force against U.S. citizens and non-citizens alike within the United States. *See, e.g.* 8 C.F.R. § 287.8(a)(2). What Swartz did not know at the time he shot was whether J.A. was a United States citizen or the citizen of a foreign country, and if J.A. had significant voluntary connections to the United States. (Doc. 18 at ¶ 17). It was only after Swartz shot J.A. and learned of J.A.'s identity as a Mexican national that he had any

reason to think he might be entitled to qualified immunity.[3] This Court finds that Swartz may not assert qualified immunity based on J.A.'s status where Swartz learned of J.A.'s status as a non-citizen *after* the violation. *See Moreno v. Baca*, 431 F.3d 633, 641 (9th Cir. 2005) (holding that "police officers cannot retroactively justify a suspicionless search and arrest on the basis of an after-the-fact discovery of an arrest warrant or a parole violation").[4]

This holding again contravenes that of the Fifth Circuit Court of Appeals in *Hernandez v. United States*, --- F.3d --- (2015), 2015 WL 1881566. This Court respectfully disagrees with the en banc panel's decision that "any properly asserted right was not clearly established to the extent the law requires." *Id.* at *2. In part, this may be because this Court does not characterize the question before the Court as "whether the general prohibition of excessive force applies where a person injured by a U.S. official standing on U.S. soil is

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[3] Had Swartz subsequently found that J.A. was a citizen of the United States, he could not challenge that the Constitution applied to J.A. *See Reid v. Covert*, 354 U.S. 1 (1957) (applying the Constitution to U.S. citizens abroad). Similarly, Swartz could not argue that the Constitution did not apply to legal permanent residents and perhaps even undocumented aliens who had established substantial voluntary connections with the United States. *See Ibrahim*, 669 F.3d at 994-95. Further, had J.A. been situated some thirty-five feet north in the territory of the United States, there would be no question that he would be protected by the Constitution. *Id.*

[4] Again, the Court does not reach Rodriguez' arguments that the Fifth Amendment applies if the Fourth Amendment does not. *See* Doc. 46 at 21-22. Similarly, the Court does not reach the question of whether J.A.'s Fifth Amendment rights were violated or clearly established when he was seized by Swartz.

an alien who had no significant voluntary connection to, and was not in, the United States when the incident occurred." *Id.* Instead, this Court focuses on whether an agent may assert qualified immunity on an after-the-fact discovery that the individual he shot was not a United States citizen; this Court concludes that qualified immunity may not be asserted in this manner.

VII. Conclusion

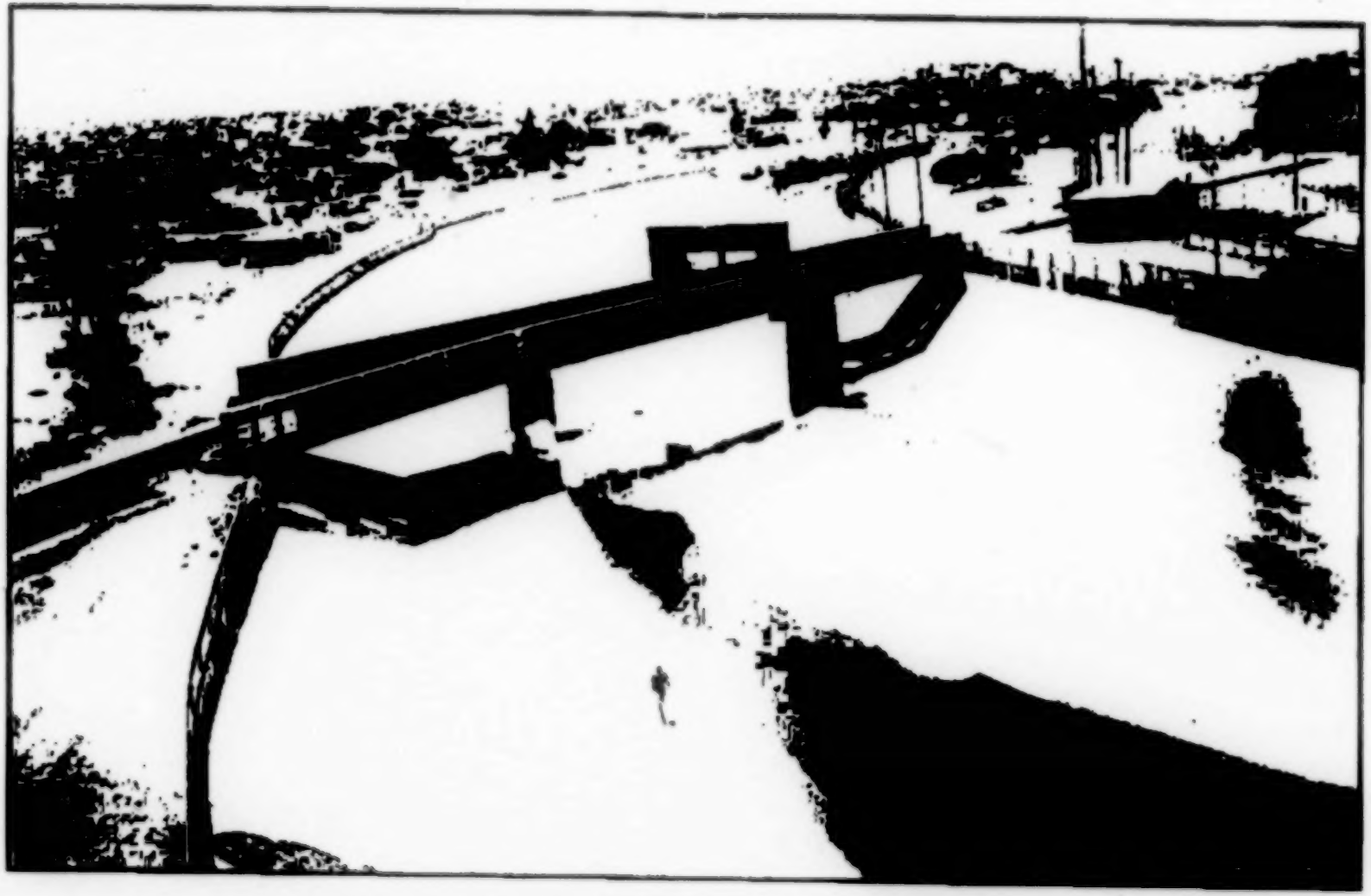
The Court finds that, under the facts alleged in this case, the Mexican national may avail himself to the protections of the Fourth Amendment and that the agent may not assert qualified immunity.

In addressing a Rule 12(b)(6) motion to dismiss, this Court must accept as true all material factual allegations in the complaint, construe the pleadings in the light most favorable to the plaintiff, and make any reasonable inferences therefrom. Applying this standard, Rodriguez has stated a claim upon which relief can be granted. J.A. was entitled to the protections of the Fourth Amendment, even as a non-citizen standing on foreign soil pursuant to both his substantial voluntary connections to the United States and *Boudemeine*'s functional approach in addressing his claim. Because Rodriguez' claim of excessive force should be analyzed under the Fourth Amendment, this Court dismisses Rodriguez' Fifth Amendment claim. Finally, Swartz cannot assert qualified immunity when he found out after-the-fact that he had exerted deadly force upon a noncitizen. Accordingly,

IT IS HEREBY ORDERED *granting in part* and *denying part* Swartz' Motion to Dismiss (Doc. 30). Rodriguez' claim pursuant to the Fifth Amendment is dismissed; Rodriguez' claim pursuant to the Fourth Amendment proceeds.

Dated this 9th day of July, 2015.

/s/ Raner C. Collins
Raner C. Collins
Chief United States District Judge



Photograph of shooting location (view from Paso del Norte bridge), Paolo Pellegrin, Magnum Photos, available at http://bit.ly/1IHkVPZ.

RECORD AND BRIEFS

Supreme Court, U.S.
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No. 15-118

In the Supreme Court of the United States

JESUS C. HERNANDEZ, ET AL., PETITIONERS

v.

JESUS MESA, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners have brought a civil action under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), seeking damages from a U.S. Border Patrol agent who, while standing in the United States, fatally shot a Mexican citizen who was in Mexico. The questions presented are as follows:

1. Whether the court of appeals erred in holding that the Mexican citizen lacked Fourth Amendment protections.

2. Whether the court of appeals erred in concluding that any substantive-due-process right under the Fifth Amendment was not clearly established.

PARTIES TO THE PROCEEDING

Petitioners were the plaintiffs-appellants in the court of appeals.

Only one respondent, Jesus Mesa, Jr., is identified in the caption of the petition for a writ of certiorari and on the Court's docket. But, as noted in the letter the government filed when waiving its response to the petition, several other entities and individuals represented by the Department of Justice—specifically, the United States, the U.S. Department of Homeland Security, U.S. Customs and Border Protection, the U.S. Border Patrol, the U.S. Immigration and Customs Enforcement, the U.S. Department of Justice, Ramiro Cordero, and Victor M. Manjarrez, Jr.—were also parties to the proceeding in the court of appeals. They were the defendants-appellants in the two other appeals brought by petitioners that were consolidated with petitioners' appeal against respondent Mesa. See Pet. App. 1-2 (caption identifying parties in the court of appeals). Although petitioners have not challenged the aspects of the court of appeals' decision affirming the dismissal of all claims against those entities and individuals, see Pet. ii; Pet. App. 3-4, 60-61, 104-105, they were nevertheless "parties to the proceeding in the court whose judgment is sought to be reviewed" and are therefore "deemed parties entitled to file documents in this Court," Sup. Ct. R. 12.6. Petitioners have acknowledged that those entities and individuals should be treated as respondents in this Court. See Cert. Reply Br. 1 n.1.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

On August 26, 2015, the government waived its right to file a response to the petition for a writ of certiorari on behalf of the United States, other federal entities, and two individuals represented by the Department of Justice in the district court and court of appeals. See p. II, *supra* (identifying those parties); Sup. Ct. R. 12.6. On November 30, 2015, the Court invited the Solicitor General to express the views of the United States. In the view of the United States, the petition should be denied.

STATEMENT

1. According to the allegations in petitioners' complaint, on June 7, 2010, petitioners' son, Sergio Adrián Hernández Güereca, a 15-year-old Mexican national, was playing with his friends in the cement culvert that separates the United States from Mexico near an international port-of-entry linking El Paso, Texas, with Ciudad Juárez, Mexico. Pet. App. 144-146. Their

alleged game involved touching the barbed-wire fence on the U.S. side of the culvert and running back into Mexico. *Ibid.*

The complaint alleges that respondent Jesus Mesa, Jr., a U.S. Border Patrol agent, arrived on the scene, detained one of Hernández's friends on the U.S. side of the border, and then, while standing in U.S. territory, fatally shot Hernández, who was in Mexico and "had no interest in entering the United States." Pet. App. 146. The FBI released a statement explaining that Agent Mesa had used force because Hernández and others had refused commands to stop throwing rocks at Mesa. *Id.* at 147.

After an investigation, the Department of Justice declined to bring any criminal charges but reiterated its regret about the loss of life and its continuing commitment to working with the Mexican government to prevent future incidents and to investigating other allegations of excessive force by law-enforcement officers. See U.S. Dep't of Justice, *Federal Officials Close Investigation into the Death of Sergio Hernandez Guereca* (Apr. 27, 2012), www.justice.gov/opa/pr/2012/April/12-crt-553.html.

2. Petitioners initially brought suit against the United States, unknown agents of the U.S. Border Patrol, and several federal agencies, alleging that the shooting of their son had violated the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680; the Alien Tort Statute (ATS), 28 U.S.C. 1350; and the U.S. Constitution. Pet. App. 122. Petitioners later named Agent Mesa as one of the agents. *Ibid.*

Pursuant to the Westfall Act, 28 U.S.C. 2679, the district court accepted the certification of the Attorney General to substitute the United States as the only

defendant for all of petitioners' FTCA and ATS claims. Pet. App. 125-126. The court subsequently dismissed those statutory claims, concluding that Congress had not waived federal sovereign immunity with respect to them. *Id.* at 127-137.

The district court, however, granted petitioners' request to amend their complaint to "refashion" their constitutional claims into "claims against unknown federal agents" under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Pet. App. 137-138. The court severed the individual-capacity claims from the ones against the United States and entered final judgment in favor of the United States. *Id.* at 138-139. Petitioners appealed that judgment. *Id.* at 58, 60.

In the new, severed suit, petitioners' Third Amended Complaint asserted *Bivens* claims under the Fourth and Fifth Amendments against Agent Mesa and those who allegedly supervised him. Pet. App. 141-142. The district court dismissed the *Bivens* claims against Mesa, holding that Mesa is entitled to qualified immunity because the Fourth and Fifth Amendments do not apply to Mexican nationals in Mexico. *Id.* at 109-119. Petitioners appealed that order without asking the district court to certify it as a final judgment. 11-331 D. Ct. Doc. 49. In a later order, the court dismissed the claims against the supervisors, because petitioners had failed to raise a genuine issue of material fact that there was any causal link between the shooting and their supervision of Mesa months or years earlier. Pet. App. 59-60. The court entered final judgment with respect to the claims against Mesa and the supervisors, and petitioners filed a third notice of appeal. 11-331 D. Ct. Docs. 51, 53.

3. The court of appeals consolidated all three appeals. Pet. App. 60. Initially, a three-judge panel affirmed in part, reversed in part, and remanded. *Id.* at 54-108.

a. As relevant here, the panel concluded unanimously (albeit on the basis of different rationales) that Agent Mesa had not violated the Fourth Amendment. Pet. App. 71-80 (Prado, J.); *id.* at 105-106 (Dennis, J., concurring in part and concurring in the judgment); *id.* at 107 (DeMoss, J., concurring in the result in this regard).

b. The panel majority nevertheless found that Agent Mesa had engaged in conscience-shocking conduct in violation of the Fifth Amendment. Pet. App. 102. The majority concluded that the Fifth Amendment was applicable in this extraterritorial context. The majority observed that this Court in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), had held the Suspension Clause applicable to aliens held at the Guantanamo Bay Naval Station. As the majority saw it, a similar result should be reached here, because Hernández was "a civilian killed outside an occupied zone or theater of war," *id.* at 82-83, and the shooting occurred in a place near the international border where the majority believed the U.S. Border Patrol exercises a degree of control sufficiently comparable to that which the United States exercised in Guantanamo Bay. Pet. App. 84-86.

The panel majority further concluded that no special factors warrant hesitation before extending a *Bivens* remedy to this new context. Pet. App. 89-99. And it held that Agent Mesa is not entitled to qualified immunity because it found that the unconstitutionality

of his conduct was clearly established at the time of the shooting. *Id.* at 102-104.[1]

c. Judge DeMoss dissented from the finding of a Fifth Amendment violation, concluding that "the Fifth Amendment does not protect a non-citizen with no connections to the United States who suffered an injury in Mexico where the United States has no formal control or de facto sovereignty." Pet. App. 108.

4. The court of appeals granted rehearing petitions filed by the United States and Agent Mesa. Pet. App. 51-53. The 15-member en banc court affirmed the district court's judgments dismissing all of petitioner's claims. *Id.* at 7. After reinstating the portions of the original panel opinion affirming the dismissal of the claims against the United States and against the supervisory defendants, the court of appeals focused on the constitutional claims against Mesa. *Id.* at 4.

a. With respect to the Fourth Amendment, the court of appeals held that petitioners had failed to allege a violation, because Hernández was "a Mexican citizen who had no 'significant voluntary connection' to the United States" and "was on Mexican soil at the time he was shot." Pet. App. 4 (quoting *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)). Only two members of the court declined to join that reasoning. As at the panel stage, Judge Dennis concurred in that result. *Id.* at 31-32. He believed that *Boume-*

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[1] The panel unanimously affirmed the dismissal of the statutory claims against the United States on sovereign-immunity grounds (Pet. App. 60-65) and the dismissal of the *Bivens* claims against the supervisory defendants (*id.* at 104). It did not address the alternative argument, pressed on behalf of the supervisory *Bivens* defendants, that the FTCA's judgment bar precludes petitioners' *Bivens* claims. See pp. 21-22, *infra*.

diene requires a more pragmatic test than was applied in *Verdugo-Urquidez*, but that the Fourth Amendment is still inapplicable because "judicial entanglement with extraterritorial Fourth Amendment excessive-force claims" would likely be "impracticable and anomalous." *Id.* at 32. Judge Graves did not dissent from the Fourth Amendment holding, but his partial concurrence stated that the court "should carefully adjudicate" that claim. *Id.* at 50.

b. The en banc court was "somewhat divided on the question of whether Agent Mesa's conduct violated the Fifth Amendment," but it was "unanimous in concluding that any properly asserted right was not clearly established to the extent the law requires." Pet. App. 5. It observed that "[r]easonable minds can differ on whether *Boumediene* may someday be explicitly extended as [petitioners] urge," but that "nothing in [*Boumediene*] presages, with the directness that the 'clearly established' standard requires, whether the Court would extend the territorial reach of a different constitutional provision—the Fifth Amendment [rather than the Suspension Clause]—and would do so where the injury occurs not on land controlled by the United States, but on soil that is indisputably foreign and beyond the United States' territorial sovereignty." *Id.* at 6.

c. Several members of the court of appeals filed concurring opinions. Judge Jones, joined by three colleagues, explained that petitioners' excessive-force claim would arise, if at all, only under the Fourth Amendment, and not under the Fifth Amendment. Pet. App. 10-11 (discussing, *inter alia*, *Graham* v. *Connor*, 490 U.S. 386, 394 (1989)). In any event, she would have further held that the Fifth Amendment

does not apply to aliens outside the sovereign territory of the United States. *Id.* at 16-20.

As noted above, Judge Dennis would have relied on *Boumediene*, rather than *Verdugo-Urquidez*, to conclude that petitioners have no valid Fourth Amendment claim. Pet. App. 31-32.

Judge Prado disagreed with Judge Jones's analysis of the merits of petitioners' Fifth Amendment claim. He concluded that *Graham* does not preclude reliance on substantive due process when the Fourth Amendment is (as here) found to be inapplicable, Pet. App. 33-36, and that "a noncitizen situated immediately beyond our nation's borders may invoke the protection of the Fifth Amendment against the arbitrary use of lethal small-arms fire by a U.S. government official standing on U.S. soil," *id.* at 41-42. But he recognized that Agent Mesa is entitled to qualified immunity because the Fifth Amendment's applicability to such circumstances is not yet clear. *Id.* at 42-43.

Judge Graves's concurring opinion agreed with the unanimous conclusion that any Fifth Amendment violation was not clearly established, but he would have given more consideration to petitioners' ATS and Fourth Amendment claims. Pet. App. 50.[2]

ARGUMENT

Petitioners first contend (Pet. 13-23) that the court of appeals erred by analyzing their Fourth Amendment claim under *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), rather than under *Boumediene* v. *Bush*, 553 U.S. 723 (2008). That contention lacks mer-

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[2] Judge Haynes, joined by two colleagues, wrote separately to address petitioners' ATS claim, Pet. App. 43-49, which is not at issue in this Court.

it, but, as the opinions below indicate, petitioners' claim would fail under either approach, and there is no disagreement in the courts of appeals that suggests otherwise. Petitioners also contend (Pet. 23-31) that the court of appeals erred in unanimously concluding that Agent Mesa is entitled to qualified immunity on their substantive-due-process claim, because its analysis relied on Hernández's status as a non-U.S. citizen, which was a fact that Mesa did not actually know at the time of the shooting. That contention—which was passed upon, at most, only implicitly—is also meritless. Any Fifth Amendment violation was not clearly established, and there is no conflict between the decision below and that of any other court of appeals. In any event, the judgment against petitioners is also supported by two alternative grounds that the government advanced below and that would obviate any need to decide either of the questions presented.

Hernández's death was tragic. This case, however, is not about the legal standard governing the justifiable application of force, but whether petitioners have alleged that Agent Mesa's actions were clearly established constitutional violations for which the Court should infer a damages remedy. Nor does the court of appeals' decision permit agents to "shoot with impunity" (Pet. 23) into Mexico. The United States has instituted criminal proceedings for another cross-border shooting and, although the government declined to extradite Mesa in this particular case, the Mexican courts have jurisdiction over any tort or crime arising from a fatal injury in Mexico. The Court should deny certiorari.

A. The Court Of Appeals Correctly Concluded That The Fourth Amendment Did Not Apply To Hernández

1. Petitioners contend (Pet. 21-23) that the court of appeals erred in holding the Fourth Amendment inapplicable to this cross-border shooting incident. As 13 members of the en banc court recognized (Pet. App. 4), that argument is foreclosed by this Court's decision in *Verdugo-Urquidez*, which involved a defendant who was taken into custody in the United States before his property in Mexico was searched. 494 U.S. at 263-264. Finding that the defendant lacked any "previous significant voluntary connection with the United States," the Court held that he had no Fourth Amendment right to assert. *Id.* at 271. In this case, petitioners' complaint acknowledges that, at the time of his shooting, Hernández was "safely and legally on his native soil of Mexico" and "had no interest in entering the United States." Pet. App. 146-147. His only alleged connection with the United States—playing a game that involved touching the border fence and running away, *id.* at 146—was not sufficient to vest in him a Fourth Amendment right to be free from unreasonable searches and seizures.

2. Petitioners do not dispute that Hernández lacked Fourth Amendment rights under *Verdugo-Urquidez*. They instead contend (Pet. 13-18) that *Verdugo-Urquidez* was implicitly overruled or modified by *Boumediene*'s more functional approach. That contention lacks merit.

Boumediene held that the Suspension Clause applied to aliens detained by the United States at the Guantanamo Bay Naval Station, in light of the "complete jurisdiction and control"—equivalent to "*de facto* sovereignty"—that the United States exercised there.

553 U.S. at 755, 763. In doing so, the Court rejected the government's argument that the United States' lack of *de jure* sovereignty over Guantanamo Bay sufficed to demonstrate that the Suspension Clause had no application there; invoking prior cases, the Court observed that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764. In making that statement, however, the Court did not mention, let alone overrule or modify, its prior decision in *Verdugo-Urquidez*, which concerned a different constitutional provision and different circumstances. And the Court did not, as petitioners infer (Pet. 17), adopt an *ad hoc* balancing test involving an unspecified array of "pragmatic and context-specific" factors, under which the Fourth Amendment's applicability would vary from case to case.

Petitioners suggest otherwise, arguing (Pet. 15-16) that *Boumediene*'s consideration of "objective factors and practical concerns" is inconsistent with the opinion for the Court in *Verdugo-Urquidez*, and draws instead from Justice Kennedy's concurring opinion, which considered whether application of the Fourth Amendment would be "impracticable and anomalous." 494 U.S. at 278. But Justice Kennedy also joined the Court's opinion in *Verdugo-Urquidez* and recognized that his discussion did not "depart in fundamental respects" from the Court's "persuasive justifications" for finding the Fourth Amendment inapplicable. *Id.* at 275, 278. And the Court's own reasons included practical considerations, such as the "significant and deleterious consequences" that extraterritorial application of the Fourth Amendment would have for "the United States in conducting activities beyond its boundaries."

Id. at 273; see *id.* at 273-274 ("Application of the Fourth Amendment to" U.S. military forces abroad "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest."). *Boumediene*, in short, left undisturbed *Verdugo-Urquidez*'s conclusion about the Fourth Amendment's inapplicability.

3. In any event, as the opinions below indicate, petitioners' Fourth Amendment claim would not succeed even under petitioners' preferred functionalist approach. The panel majority took account of the functional factors considered in *Boumediene*, Pet. App. 77, and it found that "a number of practical considerations" supported its "reluctance to extend the Fourth Amendment on these facts," *id.* at 78-80. Similarly, Judge Dennis, who was "inclined to agree" that *Boumediene* had displaced *Verdugo-Urquidez*, still concluded that "judicial entanglement with extraterritorial Fourth Amendment excessive-force claims would be likely to involve impracticable and anomalous factors." *Id.* at 31-32 (concurring in part and concurring in the judgment of the en banc court).

There is no basis for petitioners' contention (Pet. 1) that Hernández was in an area of Mexico that was under "exclusive U.S. control." The complaint includes no such allegations, Pet. App. 146-147, and the extra-record evidence cited in the original panel opinion shows at most that federal agents can, and "occasionally" do, operate in the border zone, *id.* at 84. But the same was true for the Mexican cities in which federal agents executed the searches in *Verdugo-Urquidez*. And the border area in no way resembles the "*de facto* sovereignty" at Guantanamo Bay. *Boumediene*, 553 U.S. at 755; see *id.* at 747, 753, 754, 764, 765, 769, 771

(describing the United States' authority at Guantanamo Bay as "total military and civilian control," "complete jurisdiction and control," "plenary control," "practical sovereignty," "complete and uninterrupted control * * * for over 100 years," and "complete and total control"). Indeed, it does not even approach the control the United States had inside Landsberg Prison in occupied Germany, which was itself found to be "critical[ly] differen[t]" from Guantanamo Bay. *Id.* at 768.

Petitioners declare (Pet. 23) that, unless the Fourth Amendment applies here, border patrol agents will be able to "shoot with impunity" into Mexico. But that is hyperbole. The Executive Branch's decision not to extradite an individual in this particular case (see Pet. 7) does not alter the Mexican courts' jurisdiction over any tort or crime that occurred when someone *in Mexico* was struck by a bullet. Petitioners also err in dismissing (Pet. 6-7) the possibility of a criminal prosecution for the kind of misconduct alleged here. After an investigation by the Department of Justice, no such prosecution was brought against Mesa. See p. 2, *supra*. But the United States has brought a federal murder charge against another border patrol agent who was in the United States when he shot and killed a Mexican citizen in Mexico. See *United States* v. *Swartz*, No. 15-CR-1723 (D. Ariz.); see Pet. 25-26 (describing district court decision in *Bivens* action arising from that shooting).[3]

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[3] A murder conviction could require restitution to the victim's family including lost future wages. See 18 U.S.C. 3663A(a)(1)(A) and (b)(2)(C); *United States* v. *Serawop*, 505 F.3d 1112, 1125-1128 (10th Cir. 2007) (affirming restitution to estate of three-month-old manslaughter victim including $325,751 in lost future wages).

Functional considerations thus support the conclusion that the Fourth Amendment does not apply in the circumstances here. "If there are to be restrictions on searches and seizures which occur incident to * * * American action [abroad], they must be imposed by the political branches through diplomatic understanding, treaty, or legislation." *Verdugo-Urquidez*, 494 U.S. at 275.

4. There is no disagreement in the courts of appeals about the correct answer to the Fourth Amendment question here. Since *Boumediene*, other courts of appeals have recognized that *Verdugo-Urquidez* continues to govern the extraterritorial application of the Fourth Amendment. See *United States* v. *Meza-Rodriguez*, 798 F.3d 664, 670 (7th Cir. 2015) (Wood, J.) ("At a minimum, *Verdugo-Urquidez* governs the applicability of the Fourth Amendment to noncitizens."), petition for cert. pending, No. 15-7017 (filed Nov. 16, 2015); *United States* v. *Emmanuel*, 565 F.3d 1324, 1331-1332 (11th Cir.), cert. denied, 558 U.S. 1099 (2009); see also *United States* v. *Stokes*, 726 F.3d 880, 892 (7th Cir.), cert. denied, 134 S. Ct. 713 (2013) (relying on *Verdugo-Urquidez* in holding that the Fourth Amendment's warrant requirement does not apply to searches of U.S. citizens' property abroad); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 168-169 (2d Cir. 2008) (same), cert. denied, 558 U.S. 1137 (2010).

Petitioners contend (Pet. 1-2, 13, 18-20; Cert. Reply Br. 2) that the Ninth Circuit disagreed with that consensus in *Ibrahim* v. *Department of Homeland Security*, 669 F.3d 983 (2012). But *Ibrahim* was not a Fourth Amendment case at all; instead, it addressed claims under the First and Fifth Amendments. Moreover,

unlike petitioners, the Ninth Circuit in *Ibrahim* saw no irreconcilable conflict between *Boumediene* and *Verdugo-Urquidez*. It felt "bound to follow" both "the 'functional approach' of *Boumediene* and the 'significant voluntary connection test' of *Verdugo-Urquidez*." *Id.* at 997. The majority held that a Malaysian citizen could assert her constitutional claims arising from her alleged placement on terrorist watchlists. *Ibid.* Although the plaintiff was located outside the United States at the time of her suit, she had established a "'significant voluntary connection' with the United States" because she had been a graduate student at Stanford University for several years, had allegedly been unconstitutionally placed on a No Fly List while she was still in the United States, and the purpose of her "brief" trip abroad was to present her research at a Stanford-sponsored conference, which the court saw as "further[ing]" her connection with the United States. *Id.* at 987, 997.

Petitioners do not suggest that Hernández had sufficient connections to satisfy *Ibrahim*. Instead, they assert (Pet. 19) that the Ninth Circuit may not really believe that connections to the United States are "a *prerequisite* to extraterritoriality." To that end, they invoke (Pet. 19-20) a single district court decision, which would be insufficient to establish a conflict warranting this Court's review. Sup. Ct. R. 10. That decision still required a "substantial voluntary connection," and the district court believed it had found one based on allegations about a Mexican teenager's "strong familial connections to the United States" and residence within four blocks of the border. *Rodriguez* v. *Swartz*, 111 F. Supp. 3d 1025, 1035-1036 (D. Ariz. 2015), appeal pending, No. 15-16410 (9th Cir.). Given

the absence of even such minimal allegations about Hernández's own connections to the United States, there is no basis for petitioners' assumption (Cert. Reply Br. 2) that their Fourth Amendment claim would have survived if it had been brought in Arizona rather than Texas.[4]

B. The Court Of Appeals Correctly Concluded That Agent Mesa Is Entitled To Qualified Immunity On Petitioners' Substantive-Due-Process Claim

Petitioners also contend (Pet. 23-31) that the court of appeals erred in unanimously concluding that Agent Mesa is entitled to qualified immunity on their substantive-due-process claim. In their view, all 15 members of the en banc court erroneously relied on Hernández's status as a non-U.S. citizen, when Mesa did not actually know that fact at the time of the shooting. Petitioner's argument about "an officer's after-the-fact discovery of a person's legal status" (Pet. 23) was passed upon, at most, only implicitly, without any explanation as to the court of appeals' reasons for disagreeing with petitioners. In any event, no Fifth Amendment violation was clearly established, and there is no conflict between the decision below and that of any other court of appeals.

1. Petitioners do not explain why Hernández suffered a Fifth Amendment violation, much less show that any such violation was so clearly established that qualified immunity is unavailable. They suggest (Pet.

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[4] In support of their Fourth Amendment argument, petitioners quote Judge Prado's observation that this Court might "clarify the reach of *Boumediene*." Cert. Reply Br. 2-3 (quoting Pet. App. 43). But Judge Prado made that statement in the context of petitioners' *Fifth* Amendment claim and agreed that their Fourth Amendment claim is meritless. Pet. App. 36.

29) that "a reasonable officer" would not "have believed that deadly force was necessary in the situation that [Agent Mesa] faced," but, in doing so, they cite a discussion of the Fourth Amendment in *Graham* v. *Connor*, 490 U.S. 386, 397 (1990), rather than any Fifth Amendment cases. They also suggest that, because this case involves an allegedly "unjustified extrajudicial killing," "the wrongfulness of the conduct is obvious." Pet. 30 (quotation marks omitted). Qualified immunity, however, is not about the reasonableness or wrongfulness of an officer's conduct in the abstract. An action may be unreasonable, wrong, or illegal without being unconstitutional—and, as specifically relevant here, without violating substantive due process. "To be clearly established" for qualified-immunity purposes, "a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates *that right*." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012) (emphasis added; citations, internal quotation marks, and modifications omitted).

Here, the state of Fifth Amendment law was doubly unclear. The court of appeals' members disagreed about (1) whether, in light of *Graham*, *supra*, such an excessive-force claim could be amenable to substantive-due-process analysis at all,[5] and (2) whether any

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[5] Compare Pet. App. 10-11 (Jones, J., concurring) (finding that any claim must arise under the Fourth Amendment, not the Fifth), with *id.* at 36 (Prado, J., concurring) (finding that, because "the Fourth Amendment does not 'cover' this claim of excessive force," petitioners "may invoke the Fifth Amendment's prohibition on constitutionally arbitrary official conduct").

Fifth Amendment protections would extend to someone, like Hernández, in Mexico.[6]

The answer to the first of those two questions—about the *nature* of the excessive-force claim, rather than the status of the victim—is unaffected by after-acquired facts and is therefore entirely independent of the question petitioners ask this Court to resolve. See Pet i, 23-31; Cert. Reply Br. 3-4. Moreover, uncertainty about the *Graham* question alone would keep the alleged Fifth Amendment violation from being clearly established. See *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy."); see *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011). In other words, the outcome of petitioners' qualified-immunity question does not even turn on the concerns about using hindsight on which petitioners rest their petition.

2. With respect to the second uncertainty identified by the dueling Fifth Amendment discussions in the opinions below, even if petitioners' claim properly sounds in substantive-due-process, it is far from clearly established that Hernández actually possessed Fifth Amendment rights. Petitioners contend (Pet. 23-25) that the decision below conflicts with *Moreno* v. *Baca*, 431 F.3d 633 (9th Cir. 2005), cert. denied, 547 U.S. 1207 (2006). In *Moreno*, the Ninth Circuit denied qualified immunity to two police officers who arrested and searched a U.S. citizen within the United States in violation of clearly established Fourth Amendment law. In reaching that conclusion, the court rejected

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[6] Compare Pet. App. 16-20 (Jones, J., concurring), with *id.* at 36-42 (Prado, J., concurring).

the officers' reliance on the fact that the plaintiff was on parole and that there was a warrant for his arrest, reasoning that the officers had no reason at the time to know or reasonably suspect that those facts were true. *Id.* at 638-639. It explained that "the facts upon which the reasonableness of a search or seizure depends * * * must be known to the officer at the time the search or seizure is conducted." *Id.* at 642.

The nature of the legal question in *Moreno*, however, differs from the one implicated by the decision below. *Moreno* turned on "reasonableness," 431 F.3d at 642, and presented no uncertainty about the threshold question of whether the defendant, who was in the United States when he was searched, was protected by the Fourth Amendment. Similarly, the Seventh and Eleventh Circuit decisions that petitioners cite (Pet. 27) involved queries about what constitutes "excessive" force in situations arising in the United States where the Fourth Amendment indisputably applied as a threshold matter.[7] Here, by contrast, the relevant legal question is, as discussed above, not whether Agent Mesa acted unreasonably, but the antecedent question whether Hernández had any constitutional right at all. Petitioners identify no case addressing the application of qualified-immunity analysis to such threshold questions.

Moreover, even if Agent Mesa's subjective knowledge were relevant when answering the threshold question of whether the Fifth Amendment's applicability to Hernández was clearly established, petitioners do not suggest that Mesa had any reason to know that

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[7] See *Rodriguez* v. *Farrell*, 280 F.3d 1341, 1353 (11th Cir. 2002), cert. denied, 538 U.S. 906 (2003); *McDonald by McDonald* v. *Haskins*, 966 F.2d 292, 293 (7th Cir 1992).

Hernández was a U.S. citizen or someone with substantial connections to the United States (which, in fact, he was not). And they identify no cases addressing whether an individual of *unknown* nationality has clearly established Fifth Amendment rights while outside the United States.[8] Indeed, the most analogous case that petitioners identify (the district court decision in *Rodriguez*) *dismissed* the plaintiff's Fifth Amendment excessive-force claim on the ground that such claims are "more properly analyzed under the Fourth Amendment." 111 F. Supp. 3d at 1038.

Accordingly, the second question presented does not warrant this Court's review.

C. The Dismissal Of Petitioners' *Bivens* Claims Is Independently Supported By Alternative Grounds

Even if the questions presented otherwise warranted this Court's review, this case would be a poor vehicle for their resolution because the dismissal of petitioners' *Bivens* claims is independently supported by two alternative grounds that the government advanced below: Special factors counsel against recognizing a *Bivens* remedy in the sensitive context of an international cross-border shooting incident; and the FTCA's judgment bar precludes petitioners' *Bivens* action.

1. Whatever the merits of the constitutional arguments, petitioners' suit should be dismissed as a

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[8] Cf. *Boumediene*, 553 U.S. at 760-761 (noting that, under *In re Ross*, 140 U.S. 453 (1891), U.S. citizens abroad lack constitutional rights in some circumstances); *Reid* v. *Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result) ("I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world."); *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (quoting same).

threshold matter, because the judicially inferred *Bivens* remedy should not be extended to the sensitive, cross-border context of this case.

"Because implied causes of action are disfavored," the Court has repeatedly explained that it "has been reluctant to extend *Bivens* liability to any new context or new category of defendants." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (internal quotation marks omitted). It "ha[s] consistently refused to extend *Bivens* liability" since 1980. *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001); see *Minecci* v. *Pollard*, 132 S. Ct. 617, 622-623 (2012) (listing cases). Thus, even when there is no indication from Congress that the Court should "stay its *Bivens* hand," it must "'pay[] particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Wilkie* v. *Robbins*, 551 U.S. 537, 550, 554 (2007) (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)).

Although the en banc court of appeals did not address this question, Pet. App. 7 n.1, the original panel majority concluded that no special factors counsel hesitation before extending the *Bivens* remedy to the concededly new context of this case because it ultimately involves "domestic law enforcement and nothing more," *id.* at 98. But that is simply not true. The Department of Homeland Security and its components, including U.S. Customs and Border Protection, have been charged by Congress with a primary mission of preventing terrorist attacks within the United States and securing the border. See 6 U.S.C. 111, 202. Hernández was in Mexico when he was shot. Petitioners' suit thus implicates national security and international

diplomacy (as shown by the amicus briefs that Mexico has filed in this Court and the court of appeals).

As a general matter, the Court has recognized a presumption against the extraterritorial application of judge-made causes of action, even where Congress has authorized a common-law-making power. See *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664-1665 (2013). The specific context of this case reinforces that general presumption. In *Verdugo-Urquidez*, the Court contemplated that special factors could prevent the recognition of a *Bivens* remedy for "claimed violations of the Fourth Amendment in foreign countries." 494 U.S. at 274. Moreover, in the FTCA, Congress has already provided an extensive regime for compensating the victims of torts committed by government officers, but it has declined to extend that regime to claims arising in a foreign country, despite this Court's recognition that "the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004). The same concerns that warranted that limitation on the statutory remedy support a similar limitation on any *Bivens* remedy in the context of a cross-border shooting.

2. Any *Bivens* claim by petitioners could be separately precluded by the FTCA's judgment bar, which provides that "[t]he judgment in an" FTCA action "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676.

Petitioners' *Bivens* claims were added to this case after the district court had already entered the final

judgment dismissing their FTCA claim on the basis of the FTCA's exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k). See Pet. App. 127-140. In the court of appeals, the government contended that the district court's FTCA judgment triggers Section 2676's judgment bar and therefore precludes petitioners' *Bivens* actions against Agent Mesa and his alleged supervisors, which indisputably arise from the same subject matter as petitioners' previously dismissed FTCA claim. See 12-50217 and 12-50301 C.A. Br. for Appellees Cordero and Manjarrez 43-46; En Banc C.A. Supp. Br. for U.S. and Appellees Cordero and Manjarez 55-63.

In *Simmons* v. *Himmelreich*, No. 15-109 (to be argued Mar. 22, 2016), the Court is already considering whether Section 2676's judgment bar applies when (as here), the prior FTCA judgment was a dismissal based on one of the exceptions to FTCA liability contained in Section 2680. The government contends that the judgment bar applies in those circumstances. See Pet. Br. at 16-52, *Simmons*, *supra*. If the Court agrees with the government's position in *Simmons*, that would provide an independent basis for dismissing the *Bivens* claim against Agent Mesa and would obviate any need to address the merits of petitioners' Fourth Amendment and qualified-immunity arguments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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STATEMENT OF THE CASE

Petitioners allege that on June 7, 2010, their fifteen-year-old son, Sergio Adrián Hernández Güerca ("Hernández"), a citizen and resident of Mexico, was playing with his friends at the border area near the Paso del Norte Bridge in El Paso, Texas. *Jesus C. Hernández, et al. v. the United States of America, et al.*, 2012 WL 4783845, 6. According to the Petitioners, the boys were playing a game which involved running up and touching the border fence and then running back down the incline of the culvert into Mexico. *Id.* United States Border Patrol Agent Jesus Mesa, Jr., arrived at the scene and detained one of the individuals. *Id.* Hernández retreated under the Paso del Norte Bridge in Mexico. *Id.* Petitioners allege that Agent Mesa, while standing in the United States, then pointed his service weapon at Hernández and shot across the border at least twice. *Id.* Hernández was shot at least once and subsequently died. *Id.*

After the shooting, the FBI initiated an investigation and found that Agent Mesa's use of force was a result of Hernández and the other individuals surrounding him and throwing rocks at him while refusing his verbal commands to stop. *Petitioners' Petition for a Writ of Certiorari, page 5.* In fact, according to Department of Justice records, the Petitioners' son had been arrested twice before for alien smuggling and had been given voluntary returns to Mexico due to his juvenile status. And, it is not uncommon for human traffickers to use rock throwing as a way to hamper law enforcement efforts to apprehend alien

smugglers in the border regions. In the San Diego sector of the U.S.-Mexico border alone, United States Border Patrol recorded more than 400 assaults, including rock throwings, on agents since 2010. The numbers have fluctuated in recent years, from 130 assaults in 2010, 77 in 2011, 133 in 2012, to 73 in 2013, according to the agency's statistics. http://www.cnn.com/2014/02/19/us/california-border-rock-throwing-death.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's interpretation of *Boumediene* and its limited holding regarding extraterritorial application of the Constitution is correct and does not need to be clarified.

A. The Petitioners' petition for a writ for certiorari is based on the idea that the three-part test inaugurated in *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), inherently creates a new way for the courts to examine whether the protections of the Constitution can be extended extraterritorially in cases where the offending conduct occur outside of United States jurisdiction. In essence, the Petitioners seek to have *Boumediene* expanded to the extent that it overturns Supreme Court precedent which already addresses extraterritorial application of constitutional protections. But *Boumediene* was fact specific, dealt only with a specific area of law, and did not overturn any Supreme Court precedent. Thus the need to clarify *Boumediene* is unnecessary because

there is law that already addresses the Petitioners' complaints.

The original question of law giving rise to the *Boumediene* opinion was whether the Suspension Clause, art. I, § 9, cl. 2 of the Constitution, applies to enemy combatants detained in the Guantanamo Bay, Cuba, military facility. *Boumediene*, 553 U.S. at 771, 128 S.Ct. at 2262. The significance of the "Great Writ," as well as the United States' plenary control at Guantanamo, was equally critical to the Court's holding. *Id.* In fact, to emphasize the importance of the Writ issue, this Court pointed out that "[i]n the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause." *Id.* This Court even cited Blackstone, who called the great writ the "bulwark of our liberties." *Id.* at 739, 742, 128 S.Ct. at 2244, 2246 (citing 1 W. Blackstone, Commentaries). Additionally, the Court also held that the concerns regarding separation of powers have particular bearing upon the Suspension Clause question, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. *Id.* at 765, 128 S.Ct. at 2259. Thus the *Boumediene* Court fashioned a test that it claimed to derive from past decisions that considered the extraterritorial reach of other constitutional provisions. *See Boumediene*, 553 U.S. at 760, 128 S.Ct. at 2256 (citing *In re Ross*, 140 U.S. 453, 11 S.Ct. 897, 35 L.Ed. 581 (1891) (Fifth and Sixth Amendments)); *id.* at 762, 128 S.Ct. at 2257 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct.

936, 94 L.Ed. 1255 (1950) (Fifth Amendment)); *id.*, 128 S.Ct. at 2257 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 1064, 108 L.Ed.2d 222 (1990) (Fourth Amendment)). The Court concluded that daily changing sovereignty alone does not determine the extraterritorial reach of the Constitution; instead, questions of extraterritoriality turn on objective factors and practical concerns, not formalism. *Boumediene*, 553 U.S. at 764, 128 S.Ct. at 2258.

Ultimately, the Court held that its three-factor test was relevant in determining the reach of the Suspension Clause. *Id.* at 766, 128 S.Ct. at 2259. And more specifically, the Court stated that the *Boumediene* decision applies only to the premise that Petitioners before the Court are entitled to seek the writ and that the DTA review procedures were an inadequate substance for habeas corpus. *Id.* at 795, 128 S.Ct. at 2275. Nowhere in the opinion did the *Boumediene* court overturn *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (aliens outside the sovereign territory of the United States are not entitled to Fifth Amendment rights), or *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 1064, 108 L.Ed.2d 222 (1990) (Fourth Amendment protects only aliens with significant voluntary connections to the United States). To the contrary, in light of the Court's repeated references to the Suspension Clause, one can only assume that the Court explicitly confined its holding only to the extraterritorial reach of the Suspension Clause and

disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause. *See Ali v. Rumsfeld*, 649 F.3d 762, 771 (D.C. Cir. 2011); *Al Bahlul v. United States*, 767 F.3d 1, 33 (D.C. Cir. 2014) (en banc) (Henderson, J., concurring) ("Whether *Boumediene* in fact portends a sea change in the extraterritorial application of the Constitution writ large, we are bound to take the Supreme Court at its word when it limits its holding to the Suspension Clause."); *Igartúa v. United States*, 626 F.3d 592, 600 (1st Cir. 2010) ("[T]he *Boumediene* court was concerned only with the Suspension Clause . . . not with . . . any other constitutional text.").

In essence, *Boumediene* and its three-factor test applies to a specific constitutional provision. Thus, the Petitioners request to have the constitution's extraterritorial application examined since the holding of *Boumediene* is unnecessary because there already exists clearly established law which applies to the Petitioners' rights to extraterritorial application of the Fourth or Fifth Amendment.

B. In addition to the obviousness of *Boumediene*'s limited holding, the Petitioners' claim for constitutional protection is answered by this court's previous holding in *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 1064, 108 L.Ed.2d 222 (1990).

This Court's holding in *Johnson*, which has been reiterated since, is that as a general matter aliens outside the sovereign territory of the United States are not entitled to Fifth Amendment rights. *Johnson*, 339 U.S. at 782-85, 70 S.Ct. at 945-47. Even the *Verdugo-Urquidez* Court described *Johnson* as unambiguously "rejecting the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo-Urquidez*, 494 U.S. at 269, 110 S.Ct. at 1063. *Johnson* was similarly described by the Court in *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 2500, 150 L.Ed.2d 653 (2001); *see also Castro v. Cabrera*, 742 F.3d 595, 599 n. 5 (5th Cir. 2014) (noting that *Johnson* "reject[ed] extraterritorial application of the Fifth Amendment").

II. The Fifth Circuit's decision regarding qualified immunity does not create a circuit split amongst circuit courts.

The Petitioners seek to raise the question as to whether qualified immunity can be granted or denied based on an agent's after-the-fact discovery of a person's legal status. Specifically, the Petitioners suggest that there is a split amongst circuit courts regarding this issue. The Petitioners offer *Moreno v. Baca*, 431 F.3d 633 (9th Cir. 2005) as an example of this split. The Petitioners argue that Moreno is in conflict with the lower court's holding. In *Moreno*, police officers stopped and searched two men walking down the street. *Id.* The officers later justified their seizure

based on the fact that Moreno was a parole violator. *Id.* The officers first contend that Moreno had no Fourth Amendment rights that could have been violated by virtue of the parole condition allowing warrantless searches of his person, residence, and property; and second, the officers contend that the arrest and search were justified by the parole search condition and the outstanding arrest warrant, despite the fact that the officers did not know of either fact at the time. *Id.* at 638. The Ninth Circuit however, did not agree with the idea that police officers cannot retroactively justify a suspicionless search and arrest on the basis of an after-the-fact discovery of an arrest warrant or a parole condition – i.e., the victim of the violations status. *Id.* at 641. The Petitioners assert that the aforementioned holding in *Moreno* is in conflict with the lower court's holding in this case.

However, the facts in *Moreno* are significantly different than the facts in this case. In *Moreno*, Moreno and his companion Rodriguez, were driving to a meeting at St. Lucy's Church in the City Terrace area of Los Angeles, California. *Id.* at 636. After their car broke down, Moreno and Rodriguez proceeded toward the meeting on foot. *Id.* At approximately 7 p.m., a marked Los Angeles County Sheriff patrol car passed them as they walked down the street, made a U-turn, and pulled the car onto the curb in their path. *Id.* Two deputies got out of the car. *Id.* Deputy Banks, who was riding in the passenger seat, ordered Moreno and Rodriguez to approach. *Id.* It is undisputed, however, that the deputies learned that Moreno was

on parole and that he had an outstanding arrest warrant only after searching and detaining him. *Id.* at 637. Moreno was subsequently charged in state court with possession of a controlled substance. *Id.* Deputies Banks and Garcia testified against him at trial and Rodriguez testified for the defense. *Id.* Moreno was acquitted by a jury in 2002. *Id.* Moreno then brought this action under 42 U.S.C. § 1983, contending that the two deputies violated his Fourth Amendment right to be free from unreasonable searches and seizures when they arrested and searched him without cause. *Id.* The officers claimed they were protected by qualified immunity. *Id.*

The qualified immunity framework has been long established by the Supreme Court. In 1982, the Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) established that governmental officials performing discretionary functions are immune from civil liability as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Wyatt v. Cole*, 504 U.S. 158, 166 (1992). This doctrine ensures that governmental officers' on-the-spot judgments are not evaluated with twenty-twenty hindsight. *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997).

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, the court must decide whether the facts that Petitioners have alleged make out a violation of a

constitutional right. *See Pearson v. Callahan*, 129 S.Ct. 808, 815-816 (2009). In some cases, the ruling on this first question may end the legal inquiry, and the case against the agent, for "[i]f no constitutional right would have been violated were the [factual] allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier*, 533 U.S. at 201 (citing *Stiegert v. Gluey*, 500 U.S. 226, 232 (1991)).

If Petitioners satisfy the first question, the court must decide whether the right at issue was "clearly established that the officer's conduct was unlawful in the circumstances of this case" at the time of the defendant's alleged misconduct. *Saucier*, 533 U.S. at 201. In other words, qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right. *Pearson*, 129 S.Ct. at 816 (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

In *Pearson*, the Supreme Court further held that following the rigid two-step test under *Saucier* would no longer be mandatory, and that courts should "be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the case at hand." *Id.* at 818. Thus, Petitioners are required to show that Hernández had constitutional rights, and that Agent Mesa violated those rights in order to avoid Agent Mesa's qualified immunity defense.

And, the contours of the right have to be clear enough that a reasonable officer would have understood that what he or she was doing violated that right. *Anderson v. Creighton*, supra. "[A]lmost without exception in evaluating alleged violations of the Fourth Amendment, the Court has to first undertake an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Scott v. United States*, 436 U.S. 128, 137, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978); *see also Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (reasonable suspicion is simply a particularized and objective basis for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found); *Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (holding that "factual determinations bearing upon search and seizure" must be judged against an "objective standard" based on "facts available to the officer at the moment").

It is undisputed that Hernández was an alien without presence in, or any substantial connection with, the territorial United States when he was killed. Accordingly, Hernández lacked any Fourth or Fifth Amendment constitutional rights that could overcome Agent Mesa's right to qualified immunity. In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court held that an alien with no

voluntary attachment to the United States has no extraterritorial Fourth Amendment rights. *Id.* at 274-275. In *Verdugo-Urquidez*, the defendant's property was in Mexico when it was searched and the Court noted the defendant lacked any "previous significant voluntary connection with the United States," *id.* at 271, and had not accepted "societal obligations" in this country. *Id.* at 273. In so finding, the Court distinguished previous cases in which the Court held that aliens enjoy certain constitutional rights by holding that aliens only receive constitutional protections when they have come within the territory of the United States and develop substantial connections with this country. *Id.* at 271, 274-275. The substantial connections test requires that an alien have significant voluntary connection with the United States and have accepted some societal obligations. *Id.* at 271-273.

The *Verdugo-Urquidez* Court, in analyzing the applicability of the Fourth Amendment to aliens, recognized that the Court in *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed.2d 1255 (1950), previously rejected the claim that aliens have Fifth Amendment rights. *Verdugo-Urquidez*, 494 U.S. at 269 (citing *Johnson v. Eisentrager*, *supra*). In *Eisentrager*, the Supreme Court held that the Petitioners, who were held by the United States in military custody in Germany, could not invoke the protections of the Fifth Amendment because they were aliens "beyond the territorial jurisdiction of any court of the United States." 339 U.S. at 778. The *Verdugo-Urquidez* Court

described *Eisentrager*'s rejection of extraterritorial application of the Fifth Amendment as "emphatic." *Verdugo-Urquidez*, 494 U.S. at 269. The Court wrote that at least since 1886, it had extended to the person and property of resident aliens important constitutional guarantees, but in extending constitutional protection beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within the territorial jurisdiction of the United States that gave the judiciary the power to act. *Eisentrager*, 339 U.S. at 771. As it relates to the Fourth and Fifth Amendments to the United States Constitution, there is clearly a territorial distinction between those who have rights and those who do not have rights. Given the Hernández' allegations, there is no dispute but that Hernández was not within the territory of the United States such that he might have enjoyed the protection of the Fifth Amendment. Hernández was an alien to the United States and there is no allegation that he ever applied for admission to the United States or entered the United States. Indeed, according to Hernández' original pleadings, he never stepped foot into the United States. Hernández was in the sovereign territory of the Republic of Mexico when the conduct about which Petitioners complain took place. As an alien to the United States, who was not within the territory of the United States, Hernández did not enjoy the protection of the Fifth Amendment.

Additionally, the district court concluded Hernández had no Fifth Amendment rights because the Fourth Amendment is the proper vehicle with which

to bring excessive force claims against the government. Relying on *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the district court noted "all claims that law enforcement officers have used excessive force, deadly or not, in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395. Noting that not all encounters between law enforcement officers and citizens are seizures for purposes of the Fourth Amendment, the district court opined that a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of the citizen." *United States v. Mask*, 330 F.3d 330, 336 (5th Cir. 2003) (internal quotations omitted). Because Agent Mesa's use of force against Hernández amounted to a seizure, and an "[a]pprehension by the use of deadly force is a seizure," *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011), the district court correctly held that Hernández failed to state a claim under the Fifth Amendment's Due Process Clause.

Getting back to the Petitioner's asserted conflict issue between *Moreno* and the lower court's holding in this case, Agent Mesa was responding to persons running up to and making contact with the border fence at the international border between Mexico and the United States. Agent Mesa detained one of the individuals whereas the remaining persons including Hernández began to throw rocks at him.

Petitioners' Petition for a Writ of Certiorari, page 5. In addition to the rock throwing, Hernández had been arrested twice before for alien smuggling and had been voluntarily returned to Mexico due to his juvenile status.

The circumstances surrounding *Moreno* and this case could not be more different. In *Moreno*, you have two men driving an automobile in the United States, who later began walking down the street, and were subsequently approached by police officers for no apparent reason. *Moreno*, 431 F.3d at 636. In this case, you have persons attacking a law enforcement officer, on an international border with rocks – the choice of weapon for alien smugglers.

When looking at the facts available to Agent Mesa at the time of his encounter with Hernández, using the aforementioned objective standard, it is plain to see that at the time of the shooting it could be reasonably assumed by Agent Mesa that Hernández was breaking the law as an alien smuggler.

Also, the Petitioner's argument that Hernández' status must be known to Agent Mesa prior to the encounter in order for qualified immunity protection to be afforded is flawed. Hernández' citizenship status is irrelevant for purposes of qualified immunity protection in this case. Both *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 1064, 108 L.Ed.2d 222 (1990) preclude aliens from Fourth and Fifth Amendment protections

unless the aliens have significant voluntary connections to the United States or are actually within the sovereign territory of the United States. Thus, it is Hernández' status at the time which governs the application of rights, not Agent Mesa's knowledge of Hernández' status at the time of the "seizure." Additionally, the rock throwing and alien smuggling activities of Hernández at the time of his interaction with Agent Mesa, places him in a circumstance totally different from that of Moreno. As such, a genuine split of authority does not exist.

When a defendant claims qualified immunity, and if no constitutional right has been violated, the inquiry ends and the defendant is entitled to qualified immunity. *See Linebrugger v. Abercia*, 363 F.3d 537, 540 (5th Cir. 2004). None of the cases cited by the Petitioner stand for the proposition that Hernández had any established constitutional rights.

CONCLUSION

The petition for certiorari should not be granted.

Respectfully submitted,

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RECORDS AND BRIEFS

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In the Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

This case presents important and recurring questions concerning the Constitution's extraterritorial reach and the contours of qualified immunity. Respondent Mesa barely challenges, let alone weakens, the petition's showing that both questions call for this Court's review. On the first question, he offers only a competing view of the merits, and on the second, irrelevant factual distinctions designed to downplay the circuit split. Those are not reasons for this Court to stay its hand. Unless the Court intervenes now, the constitutional confusion at our borders will only increase, a perverse brand of hindsight-based immunity will take root, and federal agents in Mesa's shoes may be given license to kill with impunity.[1]

1. Mesa does not deny that the first question—whether the functionalist approach set forth in *Boumediene v. Bush*, 553 U.S. 723, 764 (2008), governs extraterritorial application of the Fourth Amendment's prohibition on deadly force—is exceptionally important and "recurring." Pet. App. 33a (Prado, J.); *see also* Gov't of Mexico Br. 4–7. Nor does Mesa deny that the Fifth Circuit's formalist analysis, disregarding *Boumediene* and relying exclusively on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), conflicts with the Ninth Circuit's functionalist approach. Pet. 18–20. Mesa could not deny this, as the Ninth Circuit's divergent precedent has already been applied to a materially indistinguishable cross-border shooting, resulting in the opposite out-

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[1] Although the petition stated (at ii) that the federal defendants are not respondents, the Solicitor General's waiver letter indicates that they should be treated as respondents because they were "parties to the proceeding in the court whose judgment is sought to be reviewed." S. Ct. Rule 12.6. On reflection, we agree, and the Court may wish to request a response from the federal respondents.

come within that circuit. Pet. App. 153a–180a. That the outcome on such a fundamental issue would turn on nothing but geography—one rule for Texas, another for Arizona and California—is intolerable.

Critically, Mesa concedes (at 3–4) that *Boumediene* "derive[s] from past decisions that considered the extraterritorial reach of other constitutional provisions," and that, under *Boumediene*, "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. Yet he maintains that *Verdugo-Urquidez's* formalism continues to govern Fourth Amendment claims because "one can only assume that [*Boumediene*] explicitly confined its holding only to the extraterritorial reach of the Suspension Clause." BIO 4.

That view, adopted by the Fifth Circuit, is directly at odds with the Ninth Circuit's conclusion—as well as those of other courts and leading scholars—that *Boumediene* governs "constitutional claims" outside the habeas context. *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012); *see also* Chemerinsky Br. 5–9. "[T]he border of the United States," the Ninth Circuit has explained, "is not a clear line that separates aliens who may bring constitutional challenges from those who may not." *Ibrahim*, 669 F.3d at 995. As Judge Dennis recognized, the Fifth Circuit's formalistic reading of *Verdugo-Urquidez* "cannot be squared with th[is] Court's later holding in *Boumediene*." Pet. App. 31105a (Dennis, J.). While "the question of which specific safeguards . . . are appropriately to be applied in a particular context" may vary by constitutional claim, *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring), *Boumediene* makes clear that the underlying inquiry must be a functionalist, pragmatic one, 553 U.S. at 764.

Ultimately, Mesa is unable to refute that this case presents an ideal opportunity "to clarify the reach of

Boumediene," and "provide clarity to law enforcement, civilians, and the federal courts tasked with interpreting the Court's seminal opinions on the extraterritorial reach of constitutional rights." Pet. App. 33a, 43a (Prado, J.). Just as this Court in *Boumediene* rejected a formalist approach to extraterritoriality that gave the Executive "the power to switch the Constitution on or off at will," it should do the same here. 553 U.S. at 765.

2. On the second question, Mesa's only response is to try to minimize the split between the decision below and *Moreno v. Baca*, 431 F.3d 633 (9th Cir. 2005), on the ground that "the facts in *Moreno* are significantly different than the facts in this case." BIO 7. But all Mesa can muster are distinctions without a difference.

The split is clear. In *Moreno*, the Ninth Circuit held that, when determining whether a right is "clearly established" for qualified-immunity purposes, the facts on which immunity turns "must be known to the officer at the time" of the conduct. 431 F.3d at 642. The Fifth Circuit, by contrast, predicated qualified immunity here on the fact—not "known to [Mesa] at the time," *id.*—that Sergio Hernandez was "an alien who had no significant voluntary connection to, and was not in, the United States when the incident occurred," Pet. App. 5a. That the later-discovered fact in *Moreno* was the petitioner's parole condition, rather than his citizenship status, is legally irrelevant. Indeed, in a case presenting virtually identical facts, a district court in the Ninth Circuit recently applied *Moreno* to conclude that an officer "may not assert qualified immunity based on [petitioner's] status where [the officer] learned of [petitioner's] status as a non-citizen *after* the violation." Pet. App. 178a.

Nor does Mesa even attempt to explain away the conflict between the decision below and the Seventh and Eleventh Circuits' approach, which likewise rejects the

use of "hindsight to judge the acts of [law enforcement] officers" for qualified-immunity purposes. *Rodriguez v. Farrell*, 280 F.3d 1341, 1353 (11th Cir. 2002); *see McDonald by McDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir. 1992); Pet. 26–27.

Only this Court's intervention can resolve these conflicts. And Mesa does not deny that this case presents an excellent vehicle in which to do so. Mesa has never contended (and does not now contend) that he knew Sergio's citizenship when he pulled the trigger. Nor has he even claimed that he could say for sure whether Sergio had crossed the invisible line into Mexico before killing him.[2]

Those cleanly presented facts highlight the absurd consequences of the Fifth Circuit's hindsight rule, which Mesa does not deny (or even acknowledge). If allowed to flourish, the Fifth Circuit's approach will turn qualified immunity's rationale on its head: Competent officers may be exposed to liability based on later-discovered facts that had no bearing on their actions. At the same time, rogue officers like Mesa—those responsible for egregious and unjustifiable acts—may escape liability based on mere happenstance. That approach has little to recommend it. This Court should step in.

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[2] Mesa argues (at 13–14) that qualified immunity is appropriate here because Sergio allegedly "began to throw rocks at him" and "had been arrested twice before for alien smuggling," making it reasonable to assume that Sergio "was breaking the law." Mesa cites nothing in the record to support these assertions. And video footage broadcast by several media outlets (including CNN) proves that Sergio did not throw *any* rocks at Mesa. *See* Pet. 6; Paso Del Norte Amicus Br. 8 n.3. In any event, this factual dispute was not passed on below and is irrelevant to the question presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In The
Supreme Court of the United States

JESUS C. HERNANDEZ, et al.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE AMNESTY INTERNATIONAL USA, THE CENTER FOR CONSTITUTIONAL RIGHTS, HUMAN RIGHTS FIRST, AND THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are international human rights organizations that engage in litigation, education, and advocacy to promote respect for and adherence to international human rights law and principles by all nations, including the United States. Amici curiae note that the Fifth Circuit's decision in this case eschewed the functional approach mandated by this Court in *Boumediene v. Bush*, 553 U.S. 723 (2008) in favor of a rigid, formal approach that fixated on the fortuity of the exact location of the victim of the cross-border shooting. Amici curiae are concerned that the formal approach adopted by the Fifth Circuit overlooks the obligation of U.S. courts under international law to provide a remedy for all gross violations of human rights. Amici curiae believe that this brief, which sets forth the basis of this obligation, will be of assistance to the Court in deciding whether to grant the petition for certiorari.

More detailed descriptions of the particular mission and interest of each amicus curiae are provided in Appendix A.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief. In addition to amici and their counsel, this brief was prepared with the assistance and financial support of Brent Rosenthal and the law firm of Rosenthal Weiner, LLP, Dallas, Texas. No other person or entity made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The plaintiffs in this case allege that while standing in the state of Texas, a U.S. law enforcement agent fatally shot a fifteen-year-old boy in the head without any provocation and without any conceivable law-enforcement reason for doing so. Were the assailant a private actor, these facts would support a claim for compensation under Texas law. But because the defendant was a government officer acting under color of state law, liability for the boy's death could be imposed only if allowed by the Federal Tort Claims Act or authorized under "clearly established" constitutional principles.

The district court concluded, and the en banc Fifth Circuit agreed, that because the boy happened to be on Mexican soil at the time the fatal shot hit him, the "foreign country" exception to the Federal Tort Claims Act applied to preclude government liability for the boy's death. The Fifth Circuit further concluded that because any constitutional right of an alien without a previous voluntary connection to the United States to be free from the application of excessive force by a government officer was not "clearly established" at the time of the fatal shooting, no constitutional remedy for the boy's unjustified death was available. Under the Fifth Circuit's ruling, the survivors of a boy killed by a U.S. custom agent's arbitrary and shocking use of excessive force have no remedy for his tragic death.

The Fifth Circuit's ruling is intolerable as a matter of conscience and, more importantly for this Court, in violation of basic principles of international law. But the Fourth Amendment's right to freedom from unreasonable seizures is not as territorially limited as the Fifth Circuit supposed. As Petitioners argue and as this Court's opinion in *Boumediene v. Bush*, 553 U.S. 723 (2008) indicates, the constitutional right to freedom from unreasonable seizures is not confined to U.S. citizens or aliens with a "previous voluntary connection" to the territorial limits of the United States, but extends to aliens who are present in areas under the effective control of U.S. law enforcement agencies. By allowing Petitioners in this case to pursue their claim for damages for the border agent's violation of the Fourth Amendment, the Court would clarify that aliens within an area directly adjacent to the United States and actively controlled by U.S. law enforcement are protected by the U.S. Constitution and bring U.S. law into conformity with international legal standards as well.

ARGUMENT

The Court Should Grant Certiorari to Decide Whether International Law Requires the Court to Authorize a Constitutional Remedy in This Case.

I. International Law Establishes That the Arbitrary Execution of a Person Is a Human Rights Violation That Requires a Remedy.

Under international law, all persons have the right to life, liberty, and security. The Universal Declaration of Rights, adopted by the United Nations in the wake of World War II, states simply: "Everyone has the right to life, liberty, and security of person." Universal Declaration of Human Rights (UDHR), adopted Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810, art. 3, (1948), at 71. The International Covenant on Civil and Political Rights ("ICCPR"), a cornerstone human rights treaty to which the United States is a party,[2] provides that no person "shall be arbitrarily deprived of his life" and requires that the "inherent right to life" be "protected by law." ICCPR, art. 6, 999 U.N.T.S. 171 (Dec. 16, 1966).

International law recognizes that a government actor may not arbitrarily deprive a person of the right to life even in law enforcement situations. *See*

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[2] Although the United Nations promulgated the ICCPR in 1966, Congress did not ratify the treaty until 1992. 138 Cong. Rec. S4, 781-84 (daily ed. Apr. 2, 1992).

Restatement (Third) of Foreign Relations Law of the United States § 702, comment f (1987) ("It is a violation of international law for a state to kill an individual other than as lawful punishment pursuant to a conviction in accordance with due process of law, or as necessary under exigent circumstances, for example by police officers in line of duty in defense of themselves or other innocent persons, or to prevent serious crime."). Because the state has an affirmative duty to respect and protect the right to life, it must take steps to prevent arbitrary killings by its own security forces. U.N. Human Rights Comm., General Comment No. 6, ¶ 3, U.N. Doc. HRI/Gen/1 (1982) (observing that "[t]he deprivation of life by the authorities of the State is a matter of utmost gravity"). To be lawful in law enforcement situations, force must be necessary, constitute a last resort, and be applied in a proportionate manner. 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by U.N. General Assembly, 1990).

Specifically with regard to firearms, Basic Principle 9 states:

> Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.

> In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

Id. (Basic Principle 9).

The founders of this nation recognized the importance of the right not to be deprived of life arbitrarily by the hand of government. As Alexander Hamilton wrote before we gained independence from Great Britain, "[t]o bereave a man of life . . . without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation." The Federalist No. 84, p. 512 (C. Rossiter ed. 1961). More specifically, this Court has recognized that the use of deadly force is permissible only when "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Id.* at 11.

At best, the shooting of a Mexican citizen, who was posing "no significant threat of death or physical injury to the officer or others," by a U.S. law enforcement officer just feet from the U.S. border was arbitrary and unjustified. The shooting thus constituted a deprivation of the right to life and an arbitrary execution in violation of international law.

Moreover, under international law, the survivors of a person who has been arbitrarily deprived of the

right to life must have a remedy for the unjustified killing. ICCPR article 2(3) requires the government to "ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy." This obligation includes the duty to "provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law." Basic Principles and Guidelines on the Right to a Remedy and Reparation, U.N. General Assembly, Resolution 60/47, Dec. 16, 2005, art. IX, para. 15; *see also id.*, art. IX, para. 20 ("Compensation should be provided for any economically assessable damage, as appropriate and proportional to the circumstances of each case. . . ."). Ultimately, under international law "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." *The Factory at Chorzow* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A), No. 17 (Sept. 13).

In this case, the Fifth Circuit held that the Federal Tort Claims Act does not allow a suit against the federal government for the unjustified killing because the death, though caused by an act in the United States, actually occurred on foreign soil. *Hernandez v. United States*, 757 F.3d 249, 258 (5th Cir. 2014), *aff'd in part on reh'g en banc*, 785 F.3d 117, 119 (5th Cir. 2015). The court based its holding on the "foreign country" exception in the Federal Tort Claims Act, which Congress included in the Act to prevent the

imposition of liability on the federal government under unfamiliar principles of foreign law incompatible with legal norms in the United States. *Id.*; 28 U.S.C. § 1346(b)(1). Thus, unless Petitioners may pursue a claim for damages based on the violation of constitutional rights, they will be left without any remedy at all for the gross violation of international human rights law that occurred in this case.

II. Recognition of a Constitutional Claim for Damages Would Fulfill the Obligation Under International Law to Provide a Remedy for the Gross Human Rights Violation.

A claim for damages based on violation of the Fourth or Fifth Amendments fills the remedial void in this case. In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Court recognized that violation of a constitutional right gives rise to a claim for damages independent of any claim arising under state law. The Court there observed that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interest in liberty," and found it "well settled that where legal rights have been invaded, and a federal statute [such as 42 U.S.C. § 1983] provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." 403 U.S. at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

A claim arising under the Fourth or Fifth Amendments is, by definition, governed by constitutional principles developed by courts in the United States. Application of the Constitution to actions taken by a federal officer on American soil is neither unfair nor surprising, and satisfies the international mandate to provide a remedy for the unjustified taking of life without subjecting the federal officer to the vagaries of foreign law.[3]

Amici wish to be clear: damages alone are not an adequate remedy for gross violations of international human rights, such as extrajudicial killings. In other words, the availability of a remedy of the sort sought here is a necessary but not a sufficient condition of the international obligations imposed on a State.

The questions presented by the petition for certiorari ask this Court to decide whether the Fourth Amendment or Fifth Amendment applies to actions taken in the United States that cause a result that occurs on foreign soil in an area effectively controlled

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[3] According to international case law, civil damages are not sufficient or adequate to satisfy the victim's right to any effective remedy. For example, the European Court has held that the State has an obligation to criminally investigate gross violations of human rights and "that obligation cannot be satisfied merely by awarding damages . . . ." *Yasa v. Turkey*, 1998-VI Eur. Ct. H.R. 2411, ¶ 74. Similarly, the Inter-American Court of Human Rights has stated that reparation for violation of a protected right "cannot be restricted to payment of compensation to the next of kin of the victim." *Mapiripan Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 214 (Sept. 15, 2005).

by United States law enforcement officers. Pet. i. As Petitioners point out, good reasons exist for affirming the applicability of U.S. constitutional protections in these circumstances. The opportunity to satisfy the requirement of international law that a remedy be provided for any gross violation of international human rights is one more reason to recognize the applicability of the Fourth Amendment, or alternatively the Fifth Amendment, in this case.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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Amnesty International USA is the largest country section of Amnesty International, a worldwide human rights movement with a presence in over 70 countries and the support of 7 million people throughout the world. Amnesty International works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for compliance with international human rights law and international humanitarian law and standards, and it works to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated.

The Center for Constitutional Rights ("CCR") is a national nonprofit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966, CCR has a long history of litigating cases that expand access to constitutional and human rights – within and without U.S. borders – particularly to those with least access to them. CCR brought the landmark case, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the foundational case establishing the viability of the Alien Tort Statute as a mechanism to promote transnational justice, and has expanded its use to ensure application of transnational rights against non-state actors, see *Doe v. Unocal Corp.*, 305 F.3d 932 (9th Cir. 2002). CCR has also been a leading advocate ensuring rights for individuals detained outside the United States, serving as counsel for petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), which

held that federal courts have jurisdiction challenges to the legality of indefinite detention at Guantánamo, and for petitioners in *Boumediene v. Bush*, 553 U.S. 723, 769 (2008), which affirmed the principle that certain constitutional rights, such as the Suspension Clause, apply outside the formal territorial borders of the United States and is central to the issues in the instant case. *See also Arar v. Aschroft*, 585 F.3d 559 (2d Cir. 2009) (en banc) (challenging U.S. government's "extraordinary rendition" of an individual to torture in Syria); *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) (suing private military contractor for its role in torture and abuse of Iraqi detainees in Abu Ghraib).

Human Rights First is a nonprofit, nonpartisan international human rights organization based in New York and Washington, D.C. Since 1978, Human Rights First has worked to protect fundamental human rights. It promotes laws and policies that advance universal rights and freedoms and exists to protect and defend the dignity of each individual through respect for human rights and the rule of law.

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its president, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because it is greatly concerned

about, and seeks to defend, the safety and security of all individuals, regardless of their nationality, from abuses of power at the hands of the government.

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Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR *AMICUS CURIAE* DEAN ERWIN CHEMERINSKY IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and the Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law. He previously taught at Duke Law School for four years and at the University of Southern California for 21 years.

Dean Chemerinsky is a nationally prominent expert on constitutional law and civil liberties and is the author of eight books. These include his treatise *Constitutional Law: Principles and Policies*, and the casebook *Constitutional Law*. He has also written more than 200 articles in top law reviews, some of which discuss decisions and issues addressed in this brief. He frequently argues cases before the nation's highest courts, including this Court, and also serves as a commentator on legal issues for national and local media. In January 2014, *National Jurist* magazine named Dean Chemerinsky the most influential person in legal education in the United States.

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for Petitioners and Respondent received notice of *amicus curiae*'s intention to file this brief at least 10 days prior to the due date, and both consented. No party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or his counsel has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

If Petitioners' allegations are true, this case presents a horrific example of official wrongdoing – the killing, for no reason, of a Mexican child playing only a few feet from the United States border by a U.S. Border Patrol agent. Whether non-citizens like fifteen year-old Sergio Hernández enjoy constitutional protection from such abuse has been called "[o]ne of the most contentious topics in modern constitutional law." Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1867 (Nov. 2012). But it is at least agreed that the right at issue – freedom from unjustified deadly force – is of the highest possible order. It is also agreed that cases like his are bound to recur. Judges Jones and Prado disagreed strenuously on the legal landscape governing this case, but both acknowledged that the issues involved are important and will inevitably confront other federal courts. As Judge Prado put it:

> The facts in this case – though novel – are recurring, and similar lawsuits have begun percolating in the federal courts along the border. Ultimately, it will be up to the Supreme Court to decide whether its broad statements in *Boumediene* apply to our border with Mexico and to provide clarity to law enforcement, civilians, and the federal courts tasked with interpreting the Court's seminal opinions on the extraterritorial reach of constitutional rights.... [T]he law is currently unclear.

Hernandez v. United States, 785 F.3d 117, 134 (5th Cir. 2015) (*en banc*) (Prado, J. concurring); *see also id.* at 121 (Jones, J., concurring).

Given the interests at stake, the probability of recurrence, and the confusion surrounding whether constitutional rights apply to people in Hernández's circumstances, the Court should grant the petition. Without so much as mentioning this Court's landmark decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), the Fifth Circuit disposed of Petitioners' claim that Hernández's killing violated the Fourth Amendment by holding it precluded by *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). *See Hernandez*, 785 F.3d at 119. But that decision absolved DEA agents from the need to obtain a warrant before searching the foreign homes of a Mexican drug lord; it did not consider anything like the very different facts of this case. Moreover, *Boumediene* adopts a functional, pragmatic approach to extraterritoriality, echoing Justice Kennedy's concurrence in *Verdugo-Urquidez*. The Court eschewed categorical line-drawing based on citizenship or *de jure* sovereignty in favor of analyzing three factors: the claimant's citizenship and status, the nature of the place where alleged violations occurred, and practical obstacles to vindicating the claimed right. *See* 553 U.S. at 766.

Since *Boumediene*, courts and judges within circuits have divided over whether the decision supports the extension of other constitutional rights to aliens in different settings, and whether, more specifically, *Verdugo-Urquidez* precludes aliens abroad from invoking the Fourth Amendment despite the more recent teaching of *Boumediene*. Petitioners' positions on these questions have strong support among scholars; indeed, this case itself has already been the

subject of academic attention.[2] The Court should take this opportunity to clarify that *Boumediene* applies outside the limited context of the Suspension Clause, that it governs at least some aliens' Fourth Amendment claims together with *Verdugo-Urquidez*, and that the pragmatic considerations discussed in *Boumediene* support application of the Constitution in the circumstances of this case. Above all, it should forcefully repudiate the dubious constitutional regime endorsed by the Fifth Circuit – a free-fire zone where children at play steps away from the United States have lesser protection than aliens imprisoned as our country's most dangerous enemies.

ARGUMENT

I. The Court Should Grant the Petition to Clarify the Applicability of *Boumediene* to Constitutional Claims Other Than Those Involving the Suspension Clause

This Court's decision in *Boumediene* appears to reach beyond habeas corpus to establish a framework for analyzing other constitutional claims that arise extraterritorially. As a result, the panel opinion below and other courts have applied it to claims other than those based on the Suspension Clause. Leading scholars also read *Boumediene* this way. Yet some courts continue to hold that *Boumediene* is strictly

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[2] *See, e.g.*, Eva Bitran, Boumediene *at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229 (Winter 2014); Guinevere E. Moore and Robert T. Moore, *The Extraterritorial Application of the Fifth Amendment: A Need For Expanded Constitutional Protections*, 46 ST. MARY'S L. J. 1 (2014).

confined to Suspension Clause claims and is otherwise a constitutional dead letter. The Court should take this opportunity to resolve this conflict and make clear that *Boumediene's* functional standard governs non-habeas claims.

Boumediene does not appear to limit itself to disputes over the Suspension Clause. Instead, it speaks broadly of constitutional rights in general. For example, the Court introduced its discussion of the government's argument based on Cuban sovereignty over Guantanamo by observing: "The Court has discussed the issue of the Constitution's extraterritorial application on many occasions. These decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." 553 U.S. at 755; *see also id.* at 764 ("Nothing in [*Johnson v.*] *Eisentrager* [339 U.S. 763 (1950)] says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach *of the Constitution* or of habeas corpus") (emphasis added). The Court also drew support from cases involving provisions other than the Suspension Clause, such as the Insular Cases and *Reid v. Covert*, 354 U.S. 1, 18-19 (1957), which holds that the Fifth and Sixth Amendments govern U.S. trials of American citizens held overseas. *See* 553 U.S. at 756-62.

Consequently, the panel opinion below rejected the district court's view that *Boumediene* "had no bearing on this case because it did not specifically address 'the Fourth Amendment right against unreasonable searches and seizures.'" 757 F.3d at 262. On the contrary, the panel concluded that, "[t]hough

Boumediene's underlying facts concerned the Suspension Clause, its reasoning was not so narrow... Our extraterritoriality analysis must therefore track *Boumediene's*." *Id.* Judge Prado reiterated the point in his concurrence to the court's *en banc* opinion, criticizing the opposite view expressed by four other members of the court:

> Citing *Eisentrager* and *Verdugo-Urquidez*, [Judge Jones'] concurrence asserts that the Supreme Court has foreclosed the question before our Court. This uncomplicated view of extraterritoriality fails to exhibit due regard for the Court's watershed opinion in *Boumediene*, which not only authoritatively interpreted these earlier cases but also announced the bedrock standards for determining the extraterritorial reach of *the Constitution* – not just the writ of habeas corpus.

Hernandez, 785 F.3d at 136 (Prado, J., concurring, emphasis in original).

Other courts have similarly applied *Boumediene* outside the context of the Suspension Clause. In *Ibrahim v. Dept. of Homeland Security*, the Ninth Circuit scrutinized First and Fifth Amendment claims stemming from placement on a no-fly list according to the dictates of *Boumediene* as well as *Verdugo-Urquidez*. 669 F.3d 983, 996-97 (9th Cir. 2012). Likewise, the Seventh Circuit recognized *Boumediene's* applicability to an alien's assertion that he enjoyed Sixth Amendment rights despite having fled the United States. *See United States v. Wanigasinghe*, 545 F.3d 595, 597 (7th Cir. 2008) (*Boumediene* "cautions against broad pronouncements about whether the right to a

speedy trial exists in Wanigasinghe's case"), *cert. denied*, 556 U.S. 1112 (2009); *accord Bayo v. Chertoff*, 535 F.3d 749, 754 (7th Cir. 2008) (applying *Boumediene* to alien's claim regarding visa waiver: "*Boumediene* suggests that [the alien] enjoyed some constitutional protections against arbitrary government action"), *vacated on other grounds, Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010) (*en banc*); *United States v. Hayes*, __ F. Supp. 3d __, 2015 WL 1740830 at * 2 (S.D.N.Y. March 20, 2015) (extending Fifth Amendment rights to alien defendant under *Boumediene* given relevant "objective factors and practical concerns"). Even before *Boumediene*, the Second Circuit relied on Justice Kennedy's concurrence in *Verdugo-Urquidez* to hold that the Fifth Amendment covered Haitian immigrants housed at Guantanamo. *See Haitian Ctr. Council, Inc. v. McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992), *vacated as moot*, 509 U.S. 918 (1993).

Several leading commentators concur. Harvard Law School Professor Gerald Neuman, perhaps the foremost academic authority on the extraterritorial application of the Constitution, writes: "Although the holding of *Boumediene* concerned the Suspension Clause, Justice Kennedy described his functional approach as an overall framework derived from precedents involving a variety of constitutional rights." Gerald Neuman, *Extraterritoriality and the Interest of the United States in Regulating its Own*, 99 CORNELL L. REV. 1441, 1458 (Sept. 2014). He and many other scholars in the field conclude that *Boumediene* therefore governs other constitutional claims and now generally sets the terms for analyzing the extraterritorial application of constitutional

provisions.[3] As Second Circuit Judge Jose Cabranes concluded after surveying the full history of decisions exploring extraterritoriality: "Although some Justices have written in favor of a categorical approach, the trend in cases decided in the last half century strongly suggests an aversion to a categorical rule in favor of a judicially administered, multifactored analysis of the right invoked and the specific circumstances of the case." Jose A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application*

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[3] *See, e.g.*, Gerald Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 282 (Jan. 2009) (*Boumediene* "makes clear that lacking presence or property in the United States does not make a foreign national a constitutional nonperson whose interests deserve no consideration. The lower court cases need to be rethought"); Bitran, *supra*, at 231 (*Boumediene*'s applicability beyond Guantánamo "finds support in the academy"); Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 VAND. L. REV. 1373, 1411-12 (Oct. 2014) (*Boumediene* generally sets terms by which aliens "can claim the benefits of... constitutional rights, regardless of their location"); Joshua Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After* Boumediene *and the Relationship Between Habeas and Due Process*, 14 U. PA. J. CONST. L. 719, 743 (Feb. 2012) (argument that *Boumediene's* "impracticable and anomalous" test will govern other claims "captured much of the scholarly emphasis"); Stephen Vladek, Boumediene's *Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2150 (July 2009) ("doubt[ing]" *Boumediene* can be "pigeonhole[d]... as a Guantanamo-specific (or, at least, War on Terrorism specific) decision"); Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307, 309 (Summer 2011) ("government's attempt to cabin *Boumediene*" to its facts "unlikely to succeed").

of U.S. Constitutional Law, 118 YALE L. J. 1660, 1697 (June 2009).

Nonetheless, confusion persists because some courts have read *Boumediene* as narrowly limited to Suspension Clause claims. For example, the District of Columbia Circuit held that *Boumediene* does not authorize extending Fifth and Eighth Amendment rights to British citizens alleging mistreatment at Guantanamo. *See Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir.) ("*Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause"), *cert. denied*, 558 U.S. 1091 (2009); *accord Al-Bahlul v. United States*, 792 F.3d 1, 71 (D.C. Cir. 2015) (Henderson, J., dissenting) ("This Court has declined to extend *Boumediene* beyond its narrow holding"); *Doe v. United States*, 95 Fed. Cl. 546, 570 (Fed. Cl. 2010) (rejecting applicability of Fifth Amendment to Iraqi citizen: "Nothing in *Boumediene* suggests that the Court intended its holding to broadly apply to the Bill of Rights or to the takings clause, in particular"). Judges Jones, Smith, Clement and Owen also expressed this view in their concurrence below: "*Boumediene* was expressly limited to holding that the Suspension Clause . . . applies to combatants detained [at] Guantanamo." *Hernandez*, 785 F.3d at 126.

The Court should therefore grant the petition to decide whether the functional, non-formalist test for extraterritorial applicability set forth in *Boumediene* applies to constitutional claims other than those based on the Suspension Clause.

II. The Court Should Grant the Petition to Clarify How *Boumediene* and *Verdugo-Urquidez* Govern Fourth Amendment Claims That Arise Extraterritorially

A second, more specific question concerns the interplay of *Boumediene* and *Verdugo-Urquidez*. The *en banc* decision's exclusive reliance on *Verdugo-Urquidez* – as if *Boumediene* had never been decided or has no relevance to this case – contradicts the approach taken by other courts and a significant body of scholarship. These show that the two decisions can operate in concert, especially under the unique but increasingly common circumstances present here.

Unlike the *en banc* decision, the panel's opinion recognized that *Verdugo-Urquidez* should be applied "in light of *Boumediene's* general functional approach," not in a vacuum. *Hernandez*, 757 F.3d at 266. Moreover, reconciling the two decisions "is not an impossible task... because the *Verdugo–Urquidez* Court relied on more than just the text of the Fourth Amendment to reach its holding. It relied on the history of the Amendment, prior precedent, and practical consequences – all factors that we must consider after *Boumediene*." *Id.* (citations omitted). The panel examined both whether Hernández had an adequate voluntary connection to this country and whether certain "practical considerations" supported his Fourth Amendment claim. *Id.* at 266-67.

The Ninth Circuit took a similar approach in *Ibrahim*. After *Boumediene*, that court recognized, "the right of an alien outside the United States to assert constitutional claims is based on 'objective factors and

practical concerns' rather than 'formalism.'" 669 F.3d at 995 (quoting *Boumediene*, 553 U.S. at 764). The *Ibrahim* court rejected "a bright line 'formal sovereignty-based test,'" holding: "The law that we are bound to follow is, instead, the 'functional approach' of *Boumediene* and the 'significant voluntary connection' test of *Verdugo–Urquidez*." *Id.* at 997.

One other court has divided on the question. *See United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013). Faced with an Iraqi translator's claim that a court martial violated his Fifth and Sixth Amendment rights, a majority of the Court of the Armed Forces, like the *en banc* court below, relied on *Verdugo–Urquidez* and *Eisentrager* to reject the claim, ignoring *Boumediene*. *See id.* at 266-69. But Chief Judge Baker reached the opposite conclusion, since "*Boumediene* appears to significantly limit the blanket reach of both *Verdugo–Urquidez* and *Eisentrager* in favor of [a] more contextual and nuanced view." *Id.* at 278 (Baker, C.J., concurring). Judge Dennis expressed much the same opinion in this case. *See Hernandez*, 785 F.3d at 133 (Dennis, J., concurring).

Commentators have also widely concluded that *Verdugo–Urquidez* and *Boumediene* should be read together, refining the more formalistic approach taken by Justice Rehnquist's opinion in *Verdugo-Urquidez* alone. As Brigham Young Law School Professor D. Carolina Nunez summarizes: "Together, *Verdugo* and *Boumediene* suggest that strict territoriality no longer exclusively describes the Supreme Court's distribution of important constitutional rights. After *Boumediene*, *Verdugo* must be interpreted to adopt a post-territorial

approach to the Fourth Amendment, one that rejects presence within the United States as sufficient for the attachment of rights." D. Carolina Nunez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 134-35 (2011); *see also* Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 1015-19 (June 2009) ("impracticable and anomalous test" now central to extraterritoriality questions); Neuman, *The Extraterritorial Constitution*, *supra* at 261 ("*Boumediene* confirms and illustrates the current Supreme Court's 'functional approach' to the extraterritorial application of constitutional rights. The Court rejects formalistic reliance on single factors, such as nationality or location, as a basis for wholesale denial of rights").

Judge Prado was correct that this Court should now "provide clarity" to those charged with reconciling this Court's extraterritoriality decisions, particularly *Verdugo–Urquidez* and *Boumediene*. *Hernandez*, 785 F.3d at 134. "Until the Supreme Court better articulates the threshold for applying the functional approach, lower courts are likely either to be groping case by case, or to rely on crude categorizations that the Court has rejected." Neuman, *Extraterritoriality*, *supra*, at 1467; *accord* Lobel, *supra* at 308 (*Boumediene's* "import and application remain unclear").

III. The Court Should Grant the Petition to Clarify How to Evaluate Recurring Instances of Deadly Force at the Border

Lastly, the Court should grant certiorari to elucidate the Fourth Amendment's applicability to the recurring scenario of American law enforcement officers using deadly force at the U.S. border. Unfortunately, Hernández's shooting is not an isolated incident. *See* Petition at 7-8. Border Patrol agents have killed dozens of Mexican nationals in the last several years on or near the border in what have been called "highly questionable" circumstances. *Id.* at 7; *see also* Moore and Moore, *supra*, at 3 (describing incidents). Worse, the agency's internal culture may resist outside inquiry and effective self-discipline, increasing the likelihood of further incidents. *See id.* Fifth Circuit judges on opposite sides of the *en banc* decisions below agree that the tragic facts here will repeat themselves and that courts will inevitably face similar additional lawsuits. *See Hernandez*, 785 F.3d at 134 (Prado, J., concurring); *id.* at 121 (Jones, J. concurring). The Court should not wait any longer to offer necessary guidance.

Petitioners have a strong argument under *Verdugo-Urquidez* and *Boumediene* that Hernández enjoyed Fourth Amendment protection from excessive force. When holding that the amendment did not cover DEA searches of the Mexican homes of "one of the leaders of a large and violent organization in Mexico that smuggles narcotics," *Verdugo-Urquidez*, 494 U.S. at 262, the Court did not purport to settle constitutional questions surrounding the use of deadly force by other personnel in a completely different setting – standing

inside the country facing unarmed teenagers who regularly play a few feet from U.S territory. *See* Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.8(h) at 448 (5th ed. 2012) ("Thus, the *most* that can definitely be concluded from *Verdugo-Urquidez* is that the Fourth Amendment's warrant clause is inapplicable to a search conducted under the circumstances of that case" (emphasis in original)).

Hernández was not an American citizen, but his status as a Juarez resident who often played very close to the border placed him in range of an area effectively controlled by the United States, at least for purposes of law enforcement. That is, U.S. agents continuously monitor and routinely project force just over the border where Hernández was killed in order to secure the area. *See, e.g., Hernandez*, 757 F.3d. at 270 ("The Chief of the U.S. Border Patrol explains that U.S. border security policy 'extends [the nation's] zone of security outward, ensuring that our physical border is not the first or last line of defense, but one of many'"). The "objective degree of control" matters more than *de jure* sovereignty when deciding extraterritoriality, and the United States exerts substantial *de facto* control in the place where Hernández was fatally shot. *Boumediene*, 553 U.S. at 754-55.

As Petitioners note, a district court in Arizona recently confronted the task of applying both *Verdugo-Urquidez* and *Boumediene* to facts almost indistinguishable from those here, and it concluded that the Fourth Amendment applies. *See Rodriguez v. Swartz*, No. 4:14-CV-02251 (D. Ariz., July 9, 2015) (Petitioners' Appendix 153a). Although the boy's

Mexican citizenship cut against the attachment of constitutional rights, the court nonetheless found that, unlike a Mexican drug lord, his "status as a civilian engaged in a peaceful activity weighs in favor of granting him protection." *Id.* at 13. The boy had relatives in the United States and by "[l]iving in such proximity to this country, [he] was likely well-aware of the United States' (and specifically the U.S. Border Patrol's) *de facto* control and influence over Nogales, Sonora, Mexico." *Id.* The Border Patrol's allegedly extensive, quasi-military control over the area immediately adjacent to the border further supported plaintiff's claim that the Fourth Amendment has some level of applicability under the framework set by *Verdugo-Urquidez* and *Boumediene*. *Id.* at 14. The district court's thoughtful, considered analysis of the question, taking both decisions into account, contrasts sharply with the *en banc* court's brief reference to *Verdugo-Urquidez* as dispositive despite the major factual differences between that case and Hernández's, and despite the later decision in *Boumediene*.

Nor do pragmatic concerns make applying the Fourth Amendment here "impracticable and anomalous." *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring). Another key difference between this case and *Verdugo-Urquidez* is the role of the warrant requirement. "The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." *Id.* Here though, the separate Fourth Amendment

command that U.S. law enforcement personnel shoot only when they or others face serious and imminent danger, *see Tennessee v. Garner*, 471 U.S. 1, 11 (1985), requires no cooperation with foreign officials or modification of American or foreign legal procedure. It only mandates that agents follow the same elementary law enforcement rules when dealing with everyone they encounter, not just those standing on the American side of the border.

This is undoubtedly why, far from causing "friction with another country," *Hernandez*, 757 F.3d at 262, applying the Fourth Amendment here is welcomed by Mexico and would facilitate rather than harm international relations. *See id.* at 270 ("In fact, the Mexican government requests that U.S. government actors are held accountable in U.S. courts for actions on Mexican territory"). Moreover, permitting Petitioners' claims to proceed also poses no threat to "sophisticated systems of surveillance" on the border. *Hernandez*, 757 F.3d at 124. Applying the Fourth Amendment is always context-specific, balancing the intrusion into a particular claimant's autonomy against specific government interests. *See Scott v. Harris*, 550 U.S. 372, 383 (2007). *This* case involves only the episodic use of deadly force by isolated law enforcement officers, just as in the United States – not policies or tactics broadly devised by the government to further national security and immigration enforcement though monitoring or otherwise.

Lastly, permitting Petitioners' Fourth Amendment claims to proceed serves a crucial interest that animated the Court in *Boumediene*: that the executive not be permitted to "switch the Constitution on or off at

will" without constraint from the judicial branch. 553 U.S. at 765. "The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply." *Id.* Yet the Fifth Circuit's decision creates a free fire zone only feet from the United States proper where law enforcement officers may literally shoot at will, at least as far as the Constitution is concerned, with no input from the judiciary. This is exactly the opposite of what would happen if the same officers simply turned around and fired in the other direction. As the panel recognized, "a strict territorial approach would allow agents to move in and out of constitutional strictures, creating zones of lawlessness." *Hernandez*, 757 F.3d at 271.

This cannot be what the Constitution contemplates. If "[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty," *Boumediene*, 553 U.S. 739, freedom from sudden and unjustified death at the hands of government agents is even more essential. Just as the United States cannot simply kill aliens detained inside the United States for no reason, it cannot do so feet away from the border while agents stand safely on U.S. soil. *See, e.g.*, Jeffrey Kahn, *Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 716-17 (2005) (quoting acknowledgment of Deputy Solicitor General Kneedler that detained aliens have constitutional protection from extrajudicial killing in oral argument of *Clark v. Martinez*, 543 U.S. 371 (2005)).

CONCLUSION

The Court should grant the petition.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

JESUS C. HERNANDEZ, *et al.*,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE GOVERNMENT OF THE UNITED MEXICAN STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Government of the United Mexican States respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for all parties have received timely notice of Mexico's intent to file this brief and have consented in writing to its filing.[1]

On June 7, 2010, U.S. Border Patrol agent Jesus Mesa shot and killed Sergio Adrián Hernández Güereca, a fifteen-year-old national of Mexico. At the time of the shooting, the agent was in the United States, and the boy was in Mexico. Sergio's parents sued Agent Mesa in U.S. District Court for damages for the unjustified killing of their son.[2] The District Court and the Court of Appeals en banc held that their claim could not be heard because their son was on Mexican soil when he was killed.

The petition in this case raises important issues concerning the applicability of the Fourth and Fifth Amendments to the U.S. Constitution. In recognition of U.S. sovereignty, Mexico respects the authority of the United States courts to interpret their own Con-

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] As this case is before the Court on review of an order granting a motion to dismiss for failure to state a claim, we assume the facts alleged in the complaint to be true for present purposes.

stitution and laws. Mexico, however, hopes and believes that this Court will find it helpful to hear Mexico's perspective on matters affecting Mexico's sovereign interests.

As a sovereign and independent state, Mexico has a responsibility to maintain control over its territory and to look after the well-being of its nationals. When agents of the United States government violate fundamental rights of Mexican nationals and others within Mexico's jurisdiction, it is a priority to Mexico to see that the United States has provided adequate means to hold the agents accountable and to compensate the victims. The United States would expect no less if the situation were reversed and a Mexican government agent, standing in Mexico and shooting across the border, had killed a U.S. national standing on U.S. soil.

The 2,000-mile-long border between Mexico and the United States is the busiest in the world, with over 350 million crossings per year.[3] Each of the two nations is strongly engaged in and has a legitimate concern for the policies of the other in connection with their shared border. Mexico has a vital interest in working with the United States to improve the safety and security of the border and ensure that both governments' agents act to protect, rather than endanger, the safety of members of the public in the border area.

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[3] *See, e.g.*, White House Press Release, *Remarks by President Obama and President Calderón of Mexico at Joint Press Conference* (March 3, 2011).

SUMMARY OF ARGUMENT

This case involves an important and recurring fact pattern warranting the attention of this Court. The border between the United States and Mexico runs through heavily populated areas, and residents of border communities, as they go about their daily business, routinely come in contact with—or within range of the weapons of—agents of the U.S. government. In recent years, officers of the U.S. border agencies have killed dozens of individuals, justifiably or otherwise, at or near the U.S.-Mexico border. Yet the Fifth Circuit ruling effectively means the families of those killed may not obtain any remedy, no matter how unjustified the agents' actions, if the victims happened to be on the Mexican side of the border when the agent opened fire.

Under this Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), there is no bright line at the border beyond which all constitutional rights cease. Rather, this Court has employed a case-by-case inquiry to determine if it would be impractical or anomalous to apply U.S. constitutional rights outside U.S. borders. Here, Agent Mesa was clearly on U.S. soil when he acted, and there are no practical or political difficulties in applying U.S. law regardless of which side of the border Sergio Hernández was on. Unlike *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), applying U.S. law in this case would not interfere with operations of the Mexican government within Mexico. On the contrary, providing an adequate and effective remedy would show appropriate respect for Mexico's sovereignty on its own territory and for the rights of its nationals.

The decision below also failed to take due account of the binding international human rights obligations that the United States has voluntarily undertaken to Mexico and its nationals. Those include, among other things, the fundamental right not to be arbitrarily deprived of life and the right to an adequate remedy when that right has been violated. A nation's obligations to respect human rights do not stop at its borders but apply anywhere that the nation exercises effective control. The Fifth Circuit's refusal to provide any remedy at all for an unjustified cross-border shooting of an unarmed Mexican national is plainly inconsistent with those obligations.

ARGUMENT

I.
THE INCIDENT IN THIS CASE IS NOT AN ISOLATED OCCURRENCE.

The border between the United States and Mexico is, as noted, one of the busiest in the world.[4] The border runs through populated areas, in some cases dividing in two a single town, city or Indian tribal area. In recent decades, the establishment of a secured and patrolled border has meant that residents of border communities come into frequent contact with officers guarding the border. In some areas, residents going about their daily business on the Mexican side of the border spend much of their day

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[4] *See supra* note 3 and accompanying text.

within shooting distance of armed U.S. Border Patrol agents.

Shootings at the border—whether or not justified in any particular case—are, unfortunately, far from a rare occurrence. According to an April 2015 press report, U.S. Customs and Border Patrol officers and U.S. Border Patrol agents have killed fifty-one people since 2005, nearly all of them at or near the U.S.-Mexico border.[5] Five of these killings occurred in the period from October 2014 to April 2015 alone.

A number of these killings, in addition to the one at issue in this case, have involved shots fired across the border. For example, in 2012, 16 year-old José Rodríguez was shot and killed while walking down Calle Internacional, a street in Nogales, Mexico, which runs alongside the international border, by a U.S. Border Patrol officer in the United States. Calle Internacional is a busy thoroughfare lined with commercial buildings, where many residents of Nogales walk or drive when going about their daily business. In the *Rodriguez* case, the victim's mother brought a civil action in United States District Court for the District of Arizona against the Border Patrol agent who killed her son. But in that case, unlike here, the District Court denied the agent's motion to dismiss.[6]

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[5] *See* Daniel González & Rob O'Dell, *Use of Force by Border Agents Falls*, Arizona Republic, April 9, 2015, at A1.

[6] *Rodriguez v. Swartz*, No. No. 4:14-cv-02251 (D. Ariz. July 9, 2015) (Pet. App. 153), *appeal docketed*, No. 15-16410 (9th Cir. July 15, 2015).

Also in 2012, Guillermo Arévalo Pedraza, a Mexican national, was shot by U.S. Border Patrol agents who were standing on an airboat on the United States' side of the Rio Grande near Laredo, Texas, while he was celebrating his wife's and daughter's birthday at a park on the Mexican bank of the river. His wife and daughter were standing only feet away. The Border Patrol agents fled the scene, rendering no assistance to the victim, who subsequently died. Arévalo's widow filed a civil action against the Border Patrol agents in the Southern District of Texas; that suit has been stayed pending the outcome of this certiorari petition.[7]

That same year, Mexican national Juan Pablo Pérez Santillán also was killed by U.S. Border Patrol agents while he was standing in Mexican soil near the Matamoros–Brownsville, Texas, border. His mother filed a civil action in the Southern District of Texas, which has been stayed pending the outcome of this certiorari petition.[8]

For yet another example, 17-year-old Ramses Barron Torres was shot and killed in Nogales, Mexico in 2011 by Border Patrol agents standing on U.S. soil. The U.S. Justice Department declined to bring criminal charges against the agents.[9] These exam-

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[7] *Lam Gallegos v. United States*, No. 5:14-cv-00136 (S.D. Tex. Aug. 18, 2015) (order granting stay).

[8] *Cazares Santillan v. United States*, No. 1:14-cv-00114 (S.D. Tex. May 20, 2015) (order granting stay).

[9] U.S. Justice Department Press Release, *Federal Officials Close the Investigation into the Death of Ramses Barron-Torres* (Aug. 9, 2013).

ples illustrate that the incident in this case was not isolated or unique. Rather, killings of this type have occurred on multiple occasions in the past and are likely to continue to occur in the future.

II.
IT IS IMPORTANT THAT THE U.S. PROVIDE AN EFFECTIVE REMEDY IN CROSS-BORDER SHOOTING CASES

Mexico considers it important that the United States make available an effective remedy to individuals on Mexican territory seeking redress for unjustified violence by U.S. border officers. The lower courts' decisions in the case have effectively precluded any such redress, and review by this Court is important to ensure that victims of cross-border violence are not completely deprived of their day in court.

A. There Is No Practical Reason to Deny a Remedy Merely Because the Fatal Shot Struck Sergio Hernández on the Mexican Side of the Border

This Court has recognized in the past that U.S. constitutional protections can extend beyond the nation's sovereign territory. Most recently, in *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court held that questions of application of U.S. constitutional rights to persons outside the United States must be answered on the basis of "objective factors and practical concerns, not formalism." *Id.* at 764; *see also id.* at 726-28, 757-63. The *Boumediene* case involved prisoners detained at Guantánamo Bay Naval Air Station, Cuba, an area technically under

Cuban sovereignty but under the effective control of the United States. The Court accepted that Guantánamo Bay was not part of the territory of the United States. But rather than applying a technical approach based on *de jure* sovereignty, the Court looked to the practical effects of U.S. control at Guantánamo and held that the constitutional right of habeas corpus applied there.

In so holding, this Court distinguished the case from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). In *Verdugo-Urquidez*, the Court declined to extend the Fourth Amendment's search warrant requirement to a search conducted in Mexico by Mexican police at the request of the U.S. Drug Enforcement Administration. The Court noted that applying U.S. constitutional requirements to actions of the Mexican police in cooperation with U.S authorities would raise serious practical difficulties for the ability of the United States to "'functio[n] effectively in the company of sovereign nations.'" *Id.* at 275 (quoting *Perez v. Brownell*, 356 U.S. 44, 57 (1958)). In his concurring opinion, Justice Kennedy emphasized that the inapplicability of the warrant requirement did not necessarily prevent the application of other U.S. constitutional rights, but he agreed with the majority that the circumstances of that case would make adherence to the Fourth Amendment's warrant requirement "impracticable and anomalous." *Id.* at 278 (Kennedy, J., concurring) (quoted in *Boumediene*, 553 U.S. at 759-60).

Here, by contrast, applying U.S. law would cause no clashes between U.S. and Mexican law. Agent Mesa, unlike the U.S. DEA agents in *Verdugo-Urquidez*, was not acting in cooperation with Mexi-

can law enforcement agencies, nor was he carrying out any operations on Mexican territory. He was operating on U.S. soil as part of his duties under U.S. law, and he was in the United States when he fired the fatal shot. Extending the requirements of the U.S. Constitution to cover the actions of a U.S. officer in the U.S. would not interfere in any way with Mexico's "control over its territory ... and authority to apply the law there." *Boumediene*, 553 U.S. at 754 (quotation and citation omitted).

According to the Complaint, just prior to the fatal shooting, Sergio Hernández and several other children were playing in the nearly dry, concrete-lined channel of the Rio Grande, which separates El Paso from Ciudad Juárez. Pet. App. 146. The international border invisibly runs down the center line of that concrete channel.[10] The children were repeatedly running up the side of the channel, touching the U.S. border fence (which is on U.S. territory), and then running back down into the channel. Sergio Hernández was apparently on the Mexican side of the border when Agent Mesa shot him. But there would be no practical difficulties involved if the U.S. courts were to apply the same law of excessive force to Agent Mesa's actions, regardless of which side of that invisible line Sergio happened to be on when Agent Mesa's fatal shot struck him.

There is no reason why requiring Agent Mesa to answer for his actions in U.S. court would require

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[10] Convention for the Solution of the Problem of the Chamizal, U.S.-Mex., art. 3, Aug. 29, 1963, 15 U.S.T. 21, 505 U.N.T.S. 185.

any different considerations than any other excessive-force case heard by the U.S. courts. Applying U.S. constitutional law in such a case does not disrespect Mexico's sovereignty. Any invasion of Mexico's sovereignty occurred when Agent Mesa shot his gun across the border at Sergio Hernández—not when the boy's parents sought to hold Agent Mesa responsible for his actions.

When an illegal act is committed in one country and has a direct effect in another country, it is well recognized that both countries have jurisdiction. *See, e.g.*, *Restatement (Third) of the Foreign Relations Law of the United States* § 403 cmt. d (1987). Exercise of jurisdiction by either, therefore, is neither impracticable nor an affront to the sovereign interests of the other. Mexico has a fundamental interest in protecting the rights of its nationals and other persons in its territory, but the United States also has an interest in preventing its own territory from being used to launch assaults on nationals of friendly foreign nations—particularly if those attacks are carried out by a federal officer of the United States in the course of his duties.[11]

The Mexican government has sought the extradition of Agent Mesa to Mexico, but the U.S. govern-

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[11] For that reason, Judge Dennis was mistaken when he suggested, in his concurring opinion below, that it would raise "practical and political questions" to apply the U.S. law of excessive force to Agent Mesa's actions in this case. *Hernandez v. United States*, 785 F.3d 117, 133 (5th Cir. 2015) (en banc) (Dennis, J., concurring in part and concurring in the judgment) (Pet. App. 32).

ment denied that request. As a practical matter, if Agent Mesa avoids travel to Mexico, any effective and enforceable remedy against him can only come from the U.S. courts.

B. The U.S. Has Undertaken an Obligation to Provide a Remedy for Human Rights Violations to Individuals on Both Sides of the Border

Mexico and the United States have recognized that respect for basic human rights, including the right not to be arbitrarily deprived of life, is part of the international obligations of every nation. Among other things, both Mexico and the United States have ratified the International Covenant on Civil and Political Rights (ICCPR),[12] which provides in Article 6(1) that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The ICCPR further provides, in Article 2(3), that individuals whose rights are violated "shall have an effective remedy," including judicial remedies, and that those remedies must be enforced when granted.

Although the United States' obligations under the ICCPR have not been treated as directly enforceable in United States courts, *see Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court has recognized that decisions interpreting the ICCPR and other international human rights treaties may be

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[12] International Covenant on Civil and Political Rights, Dec. 19, 1966, U.S. Senate Treaty No. 95-20, 1966 U.S.T. LEXIS 521, 999 U.N.T.S. 171 (ratified by Mexico Mar. 23, 1981; ratified by U.S. June 8, 1992).

persuasive to the extent they shed light on basic human rights principles that are common to those treaties and the U.S. Constitution. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575-76 (2005); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). The international commitments that the United States undertook in Article 6(1) of the ICCPR have obvious parallels in the Fourth Amendment and the Due Process Clause of the Fifth Amendment to the U.S. Constitution. In fact, the principal reason the United States declared the ICCPR non-self-executing in U.S. courts was that it regarded existing U.S. constitutional law as being more than sufficient to comply with the ICCPR.[13]

It is well established under the ICCPR and other international human rights treaties that a nation has human rights obligations whenever it exercises "effective control" over an individual, even if such control is exercised outside of its own territory. The claim in this case lies within the scope of the United States' international human rights commitments be-

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[13] The Executive Branch advised the Senate that "the substantive provisions of [the ICCPR] are entirely consistent with the letter and spirit of the United States Constitution and laws," except in a few instances in which the U.S. took an explicit reservation against specific ICCPR provisions. Letter of Transmittal from the President to the Senate, Feb. 23, 1978, 1966 U.S.T. LEXIS 521, at *2. Interpreting the U.S. Constitution and laws as inapplicable in a situation covered by the ICCPR would leave an unexpected gap in the intended U.S. legal framework for compliance with the ICCPR.

cause the U.S. federal government, through the actions of Agent Mesa, exercised power and effective control over Sergio Hernández.

In particular, Article 2(1) of the ICCPR requires each party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR]." This provision has been read disjunctively to apply to "all individuals within [the State's] territory" and "all individuals ... subject to [the State's] jurisdiction."[14] In keeping with the intent of the ICCPR to protect individual human rights, "jurisdiction" has been given a flexible reading, turning on the State's effective exercise of control rather than on legal technicalities. The United Nations Human Rights Committee—the body

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[14] *Celiberti de Casariego v. Uruguay*, Comm'cn No. 56/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/56/1979, ¶¶ 10.1-10.3 (July 29, 1981) (Covenant applies to cases of kidnapping by State agents abroad); *Munaf v. Romania*, Comm'cn No. 1539/2006, U.N. H.R. Comm., U.N. Doc. CCPR/C/96/D/1539/2006, ¶ 14.2 (Aug. 21, 2009) (State may be liable for violations of the Covenant outside of its area of control, as long as State's activity was "a link in the causal chain that would make possible violations in another jurisdiction"); *Kindler v. Canada*, Comm'cn No. 470/1991, U.N. H.R. Comm., U.N. Doc. CCPR/C/48/D/470/1991, ¶ 14.6 (July 30, 1993) (State party may be liable under the Covenant for extraditing a person within its jurisdiction or under its control if there is a real risk that the extradited person's rights under the Covenant will be violated in the receiving jurisdiction); Dominic McGoldrick, *The International Covenant on Civil and Political Rights*, § 4.3, in *Extraterritorial Application of Human Rights Treaties* (Fons Coomans & Menno T. Kamminga eds. 2004).

charged with interpreting the ICCPR—has observed that:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.

U.N. H.R. Comm., General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (May 26, 2004).

This principle has been applied in a variety of situations in which States have violated the rights of individuals without fully controlling the territory on which those violations occur. For example, the U.N. Human Rights Committee has opined that the alleged secret detention and torture of a trade-union activist in Argentina by Uruguayan security officials would violate the ICCPR. *Lopez Burgos v. Uruguay*, Comm'cn No. 52/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981). The Committee observed that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another

State, which violations it could not perpetrate on its own territory." *Id.* ¶ 12.3.[15]

Under other human rights instruments, a similar principle has been found to apply even in situations where the State has used lethal force without ever obtaining physical custody of the victim. It is the use of force itself that constitutes sufficient exercise of control for purposes of the jurisdiction under the relevant human rights instruments. For example, the Inter-American Commission on Human Rights has applied an effective-authority test in several cases, including the *Alejandre v. Cuba*, Case No. 11,589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. (Sept. 29, 1999).[16] The *Alejandre* case arose out of the well-known 1996 "Brothers to the Rescue" incident, in which the Cuban Air Force shot down two unarmed civilian air-

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[15] Similarly, the International Court of Justice has repeatedly recognized that the ICCPR applies in occupied territory under a State's control, even though that territory is not technically part of the State's sovereign territory. *See, e.g., Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 216 (Dec. 19, 2005); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 2004 I.C.J. 136, ¶¶ 109-111 (July 9, 2004).

[16] *See also, e.g., Aisalla Molina Case (Ecuador v. Colombia)*, Inter-State Petition IP-02, Inter-Am. Comm'n. H.R., Report No. 112/10, OEA/Ser.L/V/II.140 Doc. 10, ¶¶ 87-103 (Oct. 21, 2010) (American Convention on Human Rights applied in Ecuador where Colombian armed forces conducted a bombing raid and thereafter "exercised acts of authority over the survivors" in the bombed area).

planes in international airspace between South Florida and Cuba. The Commission found that the facts constituted "conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the 'Brothers to the Rescue' organization under their authority." *Id.* ¶ 25. The Commission went on to hold that the Cuban Air Force's unjustified use of lethal force violated fundamental principles of human rights, including the right to life as recognized in Article I of the American Declaration of the Rights and Duties of Man.[17] *Id.* ¶ 53.

Likewise, the European Court of Human Rights has adopted a similar functional approach in cases arising under the European Human Rights Convention.[18] It has applied the Convention in several cases

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[17] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (May 2, 1948).

[18] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222. *See, e.g.*, *Pisari v. Moldova & Russia*, Eur. Ct. H.R., App. No. 42139/12, ¶ 33 (April 21, 2015) (convention applied to Russia where Russian solider shot and killed a Moldovan citizen even though Russian soldier was not in Russian territory when he fired his weapon); *Öcalan v. Turkey*, 41 Eur. Ct. H.R. 45, ¶ 91 (May 12, 2005) (convention applied in view of "effective Turkish authority" over individual in custody of Turkish officials in Nairobi, Kenya); *Cyprus v. Turkey*, Eur. Ct. H.R., App. No. 25781/94, ¶¶ 69-80 (May 10, 2001) (convention applied where Turkey exercised "effective control" in the Turkish Republic of Northern Cyprus); *Al-Saadoon v. United Kingdom*, Eur. Ct. H.R., App. No. 61498/08, ¶¶ 86-89 (June 30, 2009) (convention applied in U.K. military prison in Iraq); *Al-Skeini v. United Kingdom*, Eur. Ct. H.R., App.

where, as here, a State's actions within its territory resulted in injuries to victims outside its territory. For example, in *Andreou v. Turkey*, Eur. Ct. H.R., App. No. 45653/99 (Jan. 27, 2010), the European Court of Human Rights held that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within the jurisdiction' of Turkey" so as to engage Turkey's human rights obligations. *Id.* ¶ 25.[19]

This case is, in many respects, an even easier case than the cases cited. Unlike *Alejandre* and the cases involving occupied territory, the killing at issue in this case does not involve military action. Unlike *Lopez Burgos*, it does not involve overseas activities by intelligence or national security agencies. And unlike each of those cases, it does not even involve action outside a country's sovereign territo-

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No. 55721/07, ¶¶ 130-150 (July 7, 2011) (convention applied in Iraq where the Coalition Provisional Authority exercised control).

[19] *See also, e.g., Pad v. Turkey*, Eur. Ct. H.R., App. No. 60167/00, ¶¶ 52-55 (June 28, 2007) (convention applied where Turkish helicopter shot and killed seven Iranian men near the Turkey-Iran border, even if it was unclear whether the Iranian men had crossed the border into Turkey); *Pisari*, *supra* note 18, ¶ 33 (noting the accepted rule that "in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities" such that the convention and its obligations apply).

ry—Agent Mesa was standing on U.S. soil when he shot and killed Sergio Hernández. He was patrolling the United States side of the border in the course of his law-enforcement duties for the U.S. government and exercised effective control and authority over Sergio Hernández through his use of deadly force against Sergio Hernández, who happened to be across the invisible line separating the two countries.

This Court has already reached a similar result in *Boumediene*, in which it rejected a rigid territorial approach to the application of rights guaranteed by the U.S. Constitution to individuals outside the United States. Here, as in *Boumediene*, practicality and common sense—as well as the United States' international human rights obligations—demonstrate that the U.S. Border Patrol's obligation to refrain from unjustified use of deadly force does not vanish when the victim is located just across the border in the territory of a foreign nation.

CONCLUSION

For the reasons stated above, *amicus curiae* the Government of the United Mexican States respectfully urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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JESUS HERNANDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF PASO DEL NORTE CIVIL RIGHTS PROJECT AND SOUTHERN BORDER COMMUNITIES COALITION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTRODUCTION[1]

Far from being an isolated anomaly, the tragic killing of Sergio Hernandez is indicative of a broader, continuing problem at the United States-Mexico border. The killing of an unarmed Mexican citizen by the U.S. Border Patrol has recurred in the past and is likely to recur again in the future. *Amici* submit this brief in order to contextualize this case, and to demonstrate that it should be seen by this Court not merely as an academic exercise in constitutional doctrine applied to one set of *sui generis* facts, but rather as a case that has a real-world impact on many people's lives.

The Fifth Circuit's decision has tragic implications in the border region. The situation on the ground is murky, dangerous, and untenable for the millions of people who live in the region – roughly half of them American and half of them Mexican citizens, and many of them children who don't yet know why being on one side of the border is safer under the current regime. Border Patrol agents should not have the authority to shoot and kill a child with impunity just because that child turned out to

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[1] This brief is filed with the written consent of the parties after they received timely notice under Supreme Court Rule 37 of *amici*'s intent to file. Neither party nor a party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief. No person or entity other than *amici* has contributed money that was intended to fund preparing or submitting this brief.

be a Mexican citizen, and just because that child stood on Mexican soil at the time he was shot. Rather than set rules for the region, the Fifth Circuit's decision only underscored the lawless environment at the border.

Specifically, *amici* wish to highlight that the Fifth Circuit's fractured decision, full of varying interpretations,[2] underscores the need for this Court's review. The case shows that by allowing the U.S. Border Patrol to exert power over the entire region without regard to whether the subject land is *de jure* Mexican or American, the current legal framework has turned the region into a no man's land, absent basic civil and human rights. Particularly on the Mexican side of the border, families live in communities shadowed not by their own government but by America's. Children go to school and play in neighborhoods that sit adjacent to the U.S. Border Patrol's fences, culverts, and guard stations. Parents work and visit family on both sides of the border. Those parents should not have to worry if today will be the day that a border guard fires his or her sidearm from the U.S. side into Mexico, injuring or killing a child, and leaving the family without recourse.

There are countless interactions between citizens and border personnel every day; most interactions pass without incident. But on occasion a Border

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[2] *Amici* agree with Petitioners' comprehensive legal analysis of the Fifth Circuit's decision.

Patrol agent makes a poor decision. Bad actors should not get a pass, never having to answer for taking the life of another simply by the happenstance of the victim's shoes standing on one side of a border while the shooter's stand on the other.

IDENTITY AND INTERESTS OF THE *AMICI CURIAE*

Amici are non-profit organizations that provide advocacy for members of the Mexican-American community in Texas and elsewhere in the border region, particularly on border and civil rights-related concerns. Through this work and their interactions with members of the border community, *amici* can provide important input about the ways in which members of the community are affected by the operations of the United States Border Patrol (the "Border Patrol").

Paso del Norte Civil Rights Project is a regional office of the Texas Civil Rights Project ("TCRP"), a non-profit public interest law organization promoting racial, social, and economic justice through education, social services, and civil rights litigation for low-to-moderate income persons least able to defend themselves. TCRP strives to foster equality, secure justice, ensure diversity, and strengthen low-to-moderate income communities in Texas. TCRP has always had a strong interest in ensuring that individuals' civil rights and liberties under the Constitution are not

abridged or modified, whether through legislation, improper enforcement, or judicial action. Protecting the Fourth and Fifth Amendment rights of individuals coming in contact with federal law enforcement entities has always been a priority of TCRP, and it has handled significant Fourth and Fifth Amendment cases since its inception.

Southern Border Communities Coalition ("SBCC") brings together sixty organizations across the border from San Diego, California, to Brownsville, Texas, and advances the common goal of promoting a safe and strong community for border residents. The coalition was formed in March 2011 as a response to a rash of Border Patrol-perpetrated violence against unarmed border residents and has focused on advocating for border enforcement policies and practices that are accountable and fair, respect human dignity and human rights, and prevent the loss of life in the region. SBCC has engaged in advocacy demanding justice for Sergio Adrian Hernandez Güereca, Anastasio Hernandez Rojas, and several other victims of violence at the hands of federal immigration enforcement officers.

STATEMENT OF THE CASE

Petitioners, survivors of Sergio Adrian Hernandez Güereca ("Hernandez"), bring this action to invoke constitutional protection from an injury that the lower courts deemed unprotected because, while caused by

actions within the United States, impacted a Mexican citizen who happened to be on the Mexican side of the border when he was injured. United States Border Patrol Agent Jesus Mesa, Jr., while standing in the United States, intentionally shot and killed the minor Hernandez, a Mexican citizen, while Hernandez stood on the Mexican side of the border. Hernandez's family sued the United States, Mesa, and Mesa's supervisors in federal district court in Texas.

The United States moved to dismiss. On agreement of Petitioners, the U.S. became the only party defendant for tort claims. The District Court dismissed those claims, holding that the United States had not waived sovereign immunity under either the Federal Tort Claims Act or the Alien Tort Statute. Petitioners then amended their complaint to add *Bivens* actions against Mesa's supervisors under the Fourth and Fifth Amendments. Shortly after that amendment, Mesa moved to dismiss the Constitutional claims against him, asserting qualified immunity and arguing that Hernandez, as an alien injured outside the United States, lacked both Fourth and Fifth Amendment protections. The District Court agreed and dismissed all claims against Mesa. The supervisors then sought dismissal of the claims against them. Petitioners voluntarily dismissed two of the supervisors, and the District Court granted summary judgment for the remaining supervisors.

Petitioners appealed. A Panel of the Fifth Circuit Court of Appeals affirmed in part and reversed in part. The Panel affirmed the dismissal of claims

against the United States and the supervisors. The Panel also affirmed the dismissal of the Fourth Amendment claims against Mesa, but reversed the dismissal of the Fifth Amendment claims. The Panel held that a noncitizen injured outside the United States as a result of arbitrary official conduct by a law enforcement officer located in the United States may invoke the protections provided by the Fifth Amendment. The Fifth Circuit granted *en banc* review.

The *en banc* Fifth Circuit affirmed the judgment of the District Court dismissing the claims (but through conflicting opinions from multiple judges). The Court of Appeals concluded that Petitioners could not assert a claim under the Fourth Amendment because Hernandez was a Mexican citizen without voluntary connection to the U.S. and was on Mexican soil when he was shot. The Circuit could not agree on whether Mesa's conduct violated the Fifth Amendment and therefore declined to answer that question. It instead held that Mesa was entitled to qualified immunity because the applicability of the Fifth Amendment was not clearly established at the time he shot Hernandez. The Fifth Circuit splintered on many issues (as discussed by Petitioners), underscoring the uncertainty surrounding these issues and the potential for varied outcomes.

Petitioners seek *certiorari* related to their claims against Mesa only on the following two discrete questions:

I. Does a formalist or functionalist analysis govern the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area controlled by the United States?

II. May qualified immunity be granted or denied based on facts – such as the victim's legal status – unknown to the officer at the time of the incident?

ARGUMENT

I. The Untenable Situation on the Border

This case serves as an example of the vast, unfettered power that Border Patrol agents possess over their domain on the United States-Mexico border. According to the Fifth Circuit, so long as the force is exerted from the American side of the border and strikes its victim on the Mexican side, victims have no recourse. For members of the border community, this is untenable.

Hernandez was an unarmed fifteen-year-old boy playing with friends at the border near El Paso, Texas. He was not trying to cross into the United States. He was not threatening violence, or trading in narcotics, or doing anything else untoward. He was playing a game. This game involved childhood daring, running up a steep culvert to touch the border fence

and then running back down and over to the other side. For whatever reason, Mesa felt threatened.[3] So when Hernandez was standing deep within the culvert beneath a pillar of the Paso del Norte Bridge, Mesa unholstered his sidearm, aimed, and fired. The bullet crossed the border into Mexico, struck Hernandez in the face, and killed him. For this reason, and this reason alone, if the Fifth Circuit's decision is allowed to stand, Hernandez is not entitled to Constitutional protection for Mesa's actions.

This is but an example of the untenable situation at the border. We use "example" intentionally and in the plainest sense: this tragedy was but one of many. These are sadly familiar facts to those who live along the border and to those, like the *amici*, who are aware of their everyday concerns. *Amici* submit this brief to assist the Court in understanding how the Fifth Circuit's proposed rubric more firmly establishes the current violent situation in the border region. If

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[3] An early press release from the FBI's El Paso Division claimed that Hernandez had been throwing rocks at Mesa. *Assault on Federal Officer Investigated*, FBI El Paso Press Release, June 8, 2010, *available at* https://www.fbi.gov/elpaso/press-releases/2010/ep060810.htm. Within days, however, cellphone videos and witness accounts surfaced showing that Mesa was not in any danger and Hernandez did not throw any rocks. Bob Ortega & Rob O'Dell, *Deadly border agents incident cloaked in silence*, Arizona Republic, Dec. 16, 2013, *available at* http://www.azcentral.com/news/politics/articles/20131212arizona-border-patrol-deadly-force-investigation.html; CNN, *Youth fatally shot by border agent*, June 10, 2010, *available at* http://www.cnn.com/2010/US/06/10/texas.border.patrol.shooting/.

recent history tells its tale, Hernandez will not be the last victim of the Border Patrol's unfettered control over the entire border region, including Mexico. He was most certainly not the first. Some victims were attempting to cross the border into the U.S.; others, like Hernandez, were not. None should have been subject to lethal force wielded by Border Patrol agents immune from liability. Consider the following:

→ The Border Network for Human Rights found in a 2005 study of civil rights-related conditions at the border that in the previous year alone there were more than 100 documented cases of human rights violations, 20 percent of which were attributed to the Border Patrol.[4]

→ These incidents have only increased in frequency in recent years.[5] A study by

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[4] *See* BORDER NETWORK FOR HUMAN RIGHTS, BEHIND EVERY ABUSE IS A COMMUNITY: U.S./MEXICO BORDER REPORT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 9 (June 2006), *available at* http://www.bnhr.org/wp-content/uploads/2010/01/BNHR-UN-Report3.pdf; BORDER NETWORK FOR HUMAN RIGHTS, THE STATUS OF HUMAN AND CIVIL RIGHTS IN THE BORDER 2004-2005 2 (Feb. 22, 2005), *available at* http://www.bnhr.org/wp-content/uploads/2010/01/BNHR-US-Mexico-Border-Report-2000-2005.doc

[5] *See* BORDER NETWORK FOR HUMAN RIGHTS, THE STATE OF HUMAN RIGHTS AT THE U.S.-MEXICO BORDER: REPORT ON THE FINDINGS OF THE 2012 ABUSE DOCUMENTATION CAMPAIGN 13-14 (June 2012), *available at* http://docs.google.com/open?id=0B3ogXZ-WnFgOZmdDc2dNeUVpX1k ("There was an increase in both the number of reported incidents and share of Border Patrol

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amicus SBCC found that Customs and Border Protection killed 36 people between 2010 and October 2014.[6]

→ Specifically in the United States-Mexico border region, from 2010 through October 2014 Border Patrol agents were responsible for at least twenty deaths in addition to the death of Hernandez.[7]

→ For example, on May 28, 2010, Anastasio Hernandez Rojas was killed when Border Patrol agents beat him and electrocuted him with a taser. Rojas was detained while attempting to cross the border. A Border Patrol agent kicked him repeatedly in the ankles, injuring him. When Rojas informed the agent that he wished to file a complaint, that agent and two others took Rojas alone to an isolated area outside the station.[8] The agents later reported that they were then required to subdue Rojas because he was resisting, but an amateur video of those

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incidents, compared to the 2009 abuse documentation campaign.").

[6] *Border Patrol Abuse Since 2010*, October 20, 2014, *available at* http://soboco.org/border-patrol-brutality-since-2010/ ("SBCC Report").

[7] *See* SBCC Report; *see also* Brian Epstein, *Crossing the Line at the Border*, NEED TO KNOW (ON PBS) (Apr. 20, 2012), *available at* http://www.pbs.org/wnet/need-to-know/security/video-first-look-crossing-the-line/13597/.

[8] *Id.* at embedded video 4:50-6:05.

events that later emerged recorded the voice of Rojas pleading for help; the eyewitness who recorded the video stated that the agents were beating Rojas while he was lying prone on the ground, handcuffed and not resisting.[9]

→ Similarly, on January 5, 2011, a Border Patrol agent shot and killed seventeen-year-old Ramses Barron Torres near the border fence near Nogales, Arizona. Although Torres's friend, who witnessed his death, stated that the Border Patrol agent's safety had not been threatened in any way, no action was taken against the agent, apparently on the sole basis of the agent's own statement that Torres had been "throwing rocks" at him.[10]

→ Likewise, on March 21, 2011, a Border Patrol agent shot and killed nineteen-year-old Carlos La Madrid near Douglas, Arizona, as he attempted to run across the border into Mexico. Unlike Hernandez, La Madrid was engaged in criminal activity at the time, as he had been driving a car containing marijuana and was attempting to flee from law enforcement.

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[9] *Id.* at 7:46-9:38.

[10] *More Accounts Emerge Following Deadly Border Shooting*, NOGALES INTERNATIONAL, Jan. 6, 2011, *available at* http://www.nogalesinternational.com/news/more-accounts-emerge-following-deadly-border-shooting/article_998a4971-2351-5f03-a8f3-c43dd1d65cfe.html.

However, La Madrid posed no threat to the Border Patrol at the time he died; indeed, all three bullets fired by the agent who killed him struck him in the back (early allegations of rock throwing were determined to be unfounded).[11]

→ On June 21, 2011, a Border Patrol agent shot and killed Alfredo Yanez Reyes near San Diego, California, as he attempted to cross the border. At the time of Reyes's death, he and another individual who was being pursued by the Border Patrol were running back toward Mexico. As with Rojas, Torres, La Madrid, and as initially with plaintiff herein, the agent who killed Reyes claimed that he had been forced to shoot because rocks had been thrown at him. However, it is unknown whether Reyes was the person who had thrown these objects, or indeed if any rocks were thrown at all.[12]

→ 36-year-old Guillermo Arévalo Pedroza was killed by Border Patrol agents on September 3, 2012. Pedroza had been picnicking at a Mexican riverfront park

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[11] Jonathon Shacat, *Waiting for Answers One Year After Border Shooting*, DOUGLAS DISPATCH, Mar. 21, 2012, *available at* http://www.douglasdispatch.com/articles/2012/04/17/news/doc4f6a4e69e4223029057743.txt.

[12] R. Stickney, *ACLU Calls for Probe in Border Shooting*, NBC SAN DIEGO, June 22, 2011, *available at* http://www.nbcsandiego.com/news/local/ACLU-Calls-for-Probe-in-Border-Shooting-124372389.html.

with his family when a Border Patrol boat appeared on the American side of the Rio Grande, apparently chasing a young man swimming across the river. People at the park allegedly threw rocks at the agents, who opened fire onto the Mexican side and killed Pedroza.[13]

→ Our final example is the tragic case of Jose Antonio Elena Rodriguez. In October 2012, in an incident strikingly similar to Hernandez's, an agent shot and killed Jose when the agent suspected the teen was part of a group throwing rocks. He was forty feet from the border when he was shot as many as seven times, with at least eight additional bullets striking an adjacent wall. An autopsy revealed the youth may have been shot in the back or even after he had already fallen to the ground.[14]

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[13] Jason Buch, *Mexican Girl Clutched Her Dying Father*, SAN ANTONIO EXPRESS-NEWS, September 8, 2012, *available at* http://www.mysanantonio.com/news/local_news/article/Father-shot-by-border-agent-while-holding-his-3848597.php; *see also* SBCC Report.

[14] Michael Marizco, *Border Patrol Shootings Going Unresolved*, October 26, 2012, *available at* http://www.fronterasdesk.org/news/2012/oct/26/border-patrol-shootings-going-unresolved/; *Autopsy Suggests Boy Shot By Border Patrol Was Already Down*, FRONTERAS, February 7, 2013, *available at* http://www.fronterasdesk.org/content/autopsy-suggests-boy-shot-border-patrol-was-already-down.

These tragic events show the unsustainable nature of the Border Patrol's behavior in the border region. While certain of the victims in these cases were attempting to cross the border others, like Rodriguez and Hernandez, were children, victims guilty of nothing but living and playing in a violent region governed by the Border Patrol. *Amici* understand that such issues as immigration and citizenship are complex. *Amici* also understand that the great pressures Border Patrol agents are under make for a sometimes dangerous environment. But that is no excuse for Constitutional protection to depend solely on the fortuity of where (on Mexican versus American soil) a person happens to be standing when he or she is shot by a U.S. official from U.S. soil.

II. Residents at the Border Live Under the Watchful Eyes and Strong Thumbs of the Border Patrol and Must not be Denied Constitutional Protections

On a map, the border between the U.S. and Mexico is a sharp black line. The land on one side of that line is one color, the land on the other side is another. The real world is not so cleanly defined. Sometimes topography makes the actual border hazy, with deserts and mountains calling into question where one land ends and another begins. Other times, however, it is the sheer level of militarization that calls into question where one country's authority gives way to another.

Along much of the U.S.-Mexico border, American policies give the Border Patrol effective control over wide swaths of territory that on a map would be Mexican soil. We must view the border functionally, not formalistically. Functionally, the border is not the stopping point of the United States' power. The area of Mexico just over the formal border has always been a gray area where the United States has exercised partial sovereignty; this has especially been the case since the current era of aggressive border enforcement began in the 1990s. Thus, on both American and Mexican soil in the region, U.S. Border Patrol agents exert control and skirmish with migrants and criminal entities, catching otherwise innocent communities in the crossfire. This is particularly so in the precise area in which Hernandez was shot: a deep cement culvert, exposed to and controlled by the Border Patrol. While the Border Patrol may on paper only control the area at the top of one side of the culvert, as this case demonstrates, the Border Patrol exerts its power over the entire area. With the local community subject to all the constraints of U.S. executive power, it makes no rational sense to deny individuals here and in similar parts of the border region coordinate Constitutional protections.

Over centuries communities have straddled the border, with strands of the family web stringing between towns on each side. Over the years, communities have built up "symbiotic urban complexes," such as San Diego-Tijuana and El Paso-Ciudad Juarez, which have become "premier centers of international

interdependence."[15] The trans-border flow of goods and people has continued, and in equal ways has increased and earned more scrutiny from border authorities. "[The North American Free Trade Agreement ("NAFTA")] radically altered the legal structure of the border between Mexico and the United States, the social geography of the borderland, and . . . the character of Mexican sovereignty."[16] Shortly after signing the agreement, the United States began powerfully shaping the border region through operations like Gatekeeper, Safeguard, Rio Grande, and Hold the Line.[17]

Through these efforts to seal the border, the United States government's control has continued to extend increasingly farther beyond it.[18] United States border enforcement policy exerts a powerful influence on life immediately over the Mexican side of the border. Law enforcement measures at the border do

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[15] OSCAR J. MARTÍNEZ, BORDER PEOPLE: LIFE AND SOCIETY IN THE U.S.-MEXICO BORDERLANDS xviii-xix (1994).

[16] María Josefina Saldaña-Portillo, *In the Shadow of NAFTA: Y tu mamá también Revisits the National Allegory of Mexican Sovereignty*, 57 AM. QUARTERLY 751, 753 (2005).

[17] *Backgrounder: Southwest Border Security Operations*, NATIONAL IMMIGRATION FORUM 5-7, *available at* http://www.immigrationforum.org/images/uploads/SouthwestBorderSecurityOperations.pdf (last updated Dec. 2010) ["*Backgrounder*"].

[18] *See* Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J. C.R. & C.L. 165, 177 (2007) ("[D]ecoupling of legal authority from the geographic borders of the nation-state" extends the state's power "far away from [its] own geographical boundaries").

not simply react to conditions there; they shape the "location, routes, methods, and organization" of groups and individuals they seek to exclude.[19] As of 2010, six million Mexicans and 6.3 million Americans lived in the border region, many of whom were and are subject daily to the rigors of crossings due to jobs or family on the other side of the border.[20]

In this context, communities on the border understand that though they are in Mexico, they are often closely watched by American border authorities. It is when the surveillance turns into physical interaction that danger arises. *Amici* understand that American authorities need to have a certain amount of leeway when it comes to controlling the border. The Petition raises the question of what Constitutional protections are available when authorities overstep their bounds, going beyond surveillance and defense, and exert powerful, deadly physical force across the border into Mexico. *Amici* submit that if American policy allows the Border Patrol authority in the border region – on both sides of the aforementioned clean black line – then all citizens within this *de facto* American-controlled area (both American and Mexican) deserve Fourth and Fifth Amendment protections.

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[19] PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE 8 (2001).

[20] *Backgrounder*, *supra*, at 2.

III. This Court's Review is Imperative

Two factors weigh in favor of this Court, at this moment, taking on this issue. The first is that while the U.S. Border Patrol has taken certain steps to examine how it exerts authority in the region, it cannot be relied upon to govern itself. The second is that the Fifth Circuit's holding largely leaves unsettled what law – and what rights – govern the border region. *Amici* need to understand the state of the law in order to properly counsel the communities they serve.

While the U.S. Border Patrol has taken certain steps to address its history of overreach in the border region, it cannot be left bereft of proper oversight. Similarly, the executive and legislative branches are not as well-positioned as the judicial branch to ensure that Constitutional rights are protected.

While the conduct of Border Patrol agents is governed by federal criminal law, this is functionally inadequate for three reasons. First, only a relatively small subset of civil rights violations is capable of supporting criminal liability. Second, criminal prosecutions depend on the exercise of prosecutorial discretion by the very branch of government that is alleged to have committed the violations. And third, criminal prosecutions offer inadequate compensation for victims or their survivors. Additionally, history has shown the border community that Border Patrol agents almost as a rule will not face charges, as was the case with Mesa. In fact, American authorities

denied Mexican prosecutors' request to extradite Mesa to face prosecution for Hernandez's murder.

From a legislative perspective, *amici* have been involved in efforts to use political pressure to get the Border Patrol to better govern itself. But it is important to clarify that the dangerous situation in which border residents find themselves is not one that a legislative agenda alone can rectify. Here, it is up to the judicial branch to guarantee the protections – and the coordinate limitations on executive power – clearly delineated in the Constitution. Border residents need this Court to confirm that where a community is under government control, the government cannot deny that community certain basic Constitutional protections.

The Border Patrol has not been without criticism from within. U.S. Customs and Border Protection (the bureau within the Department of Homeland Security governing the Border Patrol) commissioned the Police Executive Research Forum,[21] a nonprofit research and policy organization, to undertake a study examining the Border Patrol's practices. Though the study was issued in February 2013, it was not until March of 2014 that the Border Patrol relented to pressure and issued a memorandum directing agents to exercise

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[21] Police Executive Research Forum, *U.S. Customs and Border Protection Use of Force Review: Cases and Policies*, February 2013, *available at* http://soboco.org/wp-content/uploads/2014/05/PERF-Report-Use-of-Force-Review-Cases-and-Policies.pdf.

more restraint when dealing with aggressors, including rock throwers.[22] While this is certainly commendable, the Border Patrol's position is flawed for two reasons.

First, it over-emphasized dangers potentially posed by the innocent members of the border community (*amici* question when a rock thrown by a child can ever be considered adequate provocation for the use of deadly force). Second, it did nothing to rectify those already injured or killed by overaggressive Border Patrol agents. Taken as a whole, the memorandum does not remedy a key failing particular to this case and others like it: Hernandez was not throwing a rock. The child did not pose a threat. But Mesa has not, and will not, face any repercussions under this memorandum or any other prospective Border Patrol actions. It is left to this Court to find that Hernandez had Fourth and Fifth Amendment rights under the particular circumstances of the case so that Hernandez's family can have the District Court properly determine whether Mesa violated those rights.

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[22] Memorandum OBP 80/9, *Use of Safe Tactics and Techniques*, March 7, 2014, *available at* http://www.cbp.gov/sites/default/files/documents/Use%20of%20Safe%20Tactics%20and%20Techniques.pdf; *see also* Brian Bennett, *Border Patrol Restricts Agents' Use of Force*, LA TIMES, March 7, 2014, *available at* http://www.latimes.com/nation/la-na-border-shootings-20140308-story.html#ixzz2vOlvoSJI.

Further, expecting members of a uniquely powerless group – largely comprising of non-United States citizens who cannot vote – to obtain adequate protection for their civil rights through majoritarian political means is not realistic. Moreover, as with criminal prosecution, any relief that could be obtained through the political process would be purely prospective and would do nothing for the most acute victims of the civil rights offenses.

The border community requests that this Court grant this Petition in order to settle the law governing the region not only to make sure that Border Patrol agents are answerable for past violations, but also to make clear that such behavior will not be countenanced in the future.

CONCLUSION

The border region needs a clear set of rules. The residents of the border community – American and Mexican citizens alike – deserve certain basic Constitutional protections. The fortuity of where an aggressor and victim happen to find themselves with respect to an invisible and inconsequential line should not determine whether the victim's Constitutional rights are protected.

This Court should grant the Petition.

Respectfully submitted,

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JESUS C. HERNÁNDEZ, ET AL.,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

In *Boumediene v. Bush*, this Court held that the Constitution's extraterritorial application "turn[s] on objective factors and practical concerns," not a "formal sovereignty-based test." 553 U.S. 723, 764 (2008). That holding is consistent with Justice Kennedy's concurrence two decades earlier in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), rejecting four Justices' formalist approach to extraterritorial application of the Fourth Amendment's warrant requirement.

The questions presented are:

1. Does a formalist or functionalist analysis govern the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area patrolled by the United States?

2. May qualified immunity be granted or denied based on facts—such as the victim's legal status—unknown to the officer at the time of the incident?

3. May the claim in this case be asserted under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)?

LIST OF PARTIES TO THE PROCEEDINGS

The following petitioners were plaintiffs in the district court and appellants in the court of appeals: Jesus C. Hernández, individually and as the surviving father of Sergio Adrián Hernández Güereca, and as successor-in-interest to the estate of Sergio Adrián Hernández Güereca; and Maria Guadalupe Güereca Bentacour, individually and as the surviving mother of Sergio Adrián Hernández Güereca, and as successor-in-interest to the estate of Sergio Adrián Hernández Güereca.

Respondent Jesus Mesa, Jr. was a defendant in the district court and an appellee in the court of appeals. The following entities and individuals were parties in two appeals that were consolidated by the court of appeals with the appeal that gave rise to this petition: the United States of America, the U.S. Department of Homeland Security, the U.S. Bureau of Customs and Border Protection, the U.S. Border Patrol, the U.S. Immigration and Customs Enforcement Agency, the U.S. Department of Justice, Ramiro Cordero, and Victor M. Manjarrez, Jr.

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INTRODUCTION

The U.S. Court of Appeals for the Fifth Circuit held that the U.S. Constitution afforded no protection to an unarmed boy shot to death at close range, without justification, by a U.S. border agent standing on U.S. soil.

In that court's view, an alien standing even an inch outside the U.S. border enjoys no constitutional protection—not even from extrajudicial killing. Not even when the victim is a friend and neighbor, a young civilian resident of a shared border community. Not even when the agent's conduct took place entirely on U.S. territory and its effects were felt only in an enclosed strip patrolled by federal agents. Not even when denying protection sparks diplomatic friction and "permit[s] a striking anomaly in our tripartite system of government"—the Executive's ability to threaten life or liberty "without legal constraint." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

The decision below thus offers an extreme illustration of the formalism this Court rejected eight years ago in *Boumediene*, and is the apotheosis of the view that "*de jure* sovereignty" is "the only relevant consideration in determining the geographic reach of the Constitution." *Id.* at 764. Applying "objective factors and practical concerns," *id.*, instead yields the opposite result, and preserves a modest avenue for judicial review. It also avoids creating a legal no-man's land in which federal agents can kill innocent civilians with impunity.

This Court should make clear that our border is not an on/off switch for the Constitution's most fundamental protections. And the Court should reaffirm that it remains "important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances," where none would otherwise exist. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

OPINIONS BELOW

The decision of the en banc court of appeals is reported at 785 F.3d 117 and reproduced in the petition appendix at 1a. The panel's decision is reported at 757 F.3d 249 and reproduced at 54a. The district court's decision on the claims against Agent Jesus Mesa is unreported and reproduced at 109a. The district court's decision on the claims against the United States is reported at 802 F. Supp. 2d 834 and reproduced at 120a.

JURISDICTION

The en banc court of appeals entered its judgment on April 24, 2015. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment states in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

The Fifth Amendment states in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. "

STATEMENT

A. Factual background

1. On a summer day in 2010, a fifteen-year-old boy named Sergio Hernández was playing with three friends in the concrete culvert separating El Paso, Texas and Juarez, Mexico. App. 146a. The culvert splits the cities like a cement river, with the invisible borderline running through it. To one side, toward El Paso, is a banked incline that leads to an 18-foot fence built by the U.S. as "part of a 650-mile, $2.8 billion border wall." Rice, *Life on the Line*, N.Y. Times, July 28, 2011, http://nyti.ms/1H7VvX9; *see* App. 146a. To the other side, toward Jua-

rez, is another incline leading to a wall topped with a guardrail. In between is a "concrete bank where the now-dry, 33-feet (10-meter) wide Rio Grande is." Sherman & Torres, *Mexico teen killed by US Border Patrol, anger high*, Associated Press, June 9, 2010, http://bit.ly/1JJkCW9. Overhead, "a railroad bridge linking the two nations" spans the culvert. *Id.* (A photograph of the bridge and the culvert is available at http://bit.ly/2g73LU1 and can be found in the petition appendix at 181a.)

Like countless children before them, Sergio and his friends were playing a game in which they dared each other to run up the culvert's northern incline, touch the U.S. fence, and then scamper back down to the bottom. App. 146a. Because they were not trying to smuggle themselves into the U.S., they chose a site in plain view of the Paso del Norte Port of Entry—one of the busiest border crossings in the United States. *Id.* And because they meant no harm, they were unarmed. *Id.* at 147a.

While the boys were playing, a U.S. border guard patrolling the culvert on bicycle seized one of them as they ran down the ramp. *Id.* at 146a-47a. The other boys fled back into Mexico, with Sergio running past the agent, Jesus Mesa, toward a pillar beneath the bridge on the Mexican side of the culvert. *Id.* Within seconds, Agent Mesa drew his firearm, aimed it at Sergio, and shot him in the head, next to his eye. *Id.* Neither Agent Mesa nor any of the other Border Patrol agents who swarmed the scene offered the boy medical aid of any kind; instead, they got back on their bikes and left. *Id.* at 147a. Sergio died on the spot. *Id.*

A mere 60 feet separated Sergio from Agent Mesa at the time of the shooting. But Sergio was formally in Mexican territory when he was killed, while Mesa was

formally in the United States. *Id.*; CNN, *Youth fatally shot by border agent*, June 10, 2010, http://cnn.it/1gjK1t4. And Sergio, it turned out, was a Mexican citizen who lived with his mother, brother, and two sisters in a three-room house in Juarez, where he loved playing soccer and aspired to one day become a police officer. App. 145a. His shooting marked "the second death of a Mexican at the hands of Border Patrol officers in less than two weeks." Sherman & Torres, *Mexico teen killed by US Border Patrol.*

2. One day after the shooting, federal authorities began claiming that Agent Mesa shot Sergio in self-defense. The FBI's El Paso Division put out a press release entitled "Assault on Federal Officer Investigated." FBI El Paso, Press Release, June 8, 2010, http://1.usa.gov/1JUAdQ5. The statement asserted that Mesa "responded to a group of suspected illegal aliens being smuggled into the U.S. from Mexico," and that Sergio "began to throw rocks" at Mesa from across the border. *Id.* According to the FBI, Mesa fired his gun only after he "gave verbal commands" for Sergio to "stop and retreat," and Sergio and the other boys "surrounded the agent and continued to throw rocks at him." *Id.*; *see also* App. 147a.

But two days later, "several cellphone videos" surfaced that "show[ed] a different story." Ortega & O'Dell, *Deadly border agent incidents cloaked in silence*, Arizona Republic, Dec. 16, 2013, http://bit.ly/1bHMq6p; *see* CNN, *Youth fatally shot by border agent.* The videos show that "Mesa wasn't surrounded" by the boys when he fired his weapon, nor did Sergio throw any rocks at him. Ortega & O'Dell, *Deadly border agent incidents cloaked in silence.* In one video, Sergio's small frame is "visible, peeping out from behind a pillar beneath a train

trestle. He sticks his head out; Mesa fires; and the boy falls to the ground, dead." *Id.* As CNN reported at the time, the video "contradicts [the FBI's] account." CNN, *Youth fatally shot by border agent.*

Even before the videos came to light, the shooting sparked outrage on both sides of the border. In Mexico, the government condemned it as unjustified. *Id.* "The growing frequency of this kind of event," Mexico's Foreign Ministry lamented, "reflects a troubling trend in the use of excessive force by some border authorities." Padgett, *After Teen's Death, a Border Intifadeh?*, TIME, June 10, 2010, http://ti.me/1CmTbiz. The Ministry cited records showing that "the number of Mexicans who ha[d] been killed or wounded by U.S. border authorities ha[d] increased from five in 2008 to 12 in 2009," and then to 17 in the first half of 2010. CNN, *Youth fatally shot by border agent.*

3. In the aftermath of Sergio's death, criminal prosecutors in both the U.S. and Mexico investigated the shooting—to no avail. On the U.S. side, prosecutors had to decide whether jurisdiction existed under federal criminal civil-rights laws or the federal murder statute, given Sergio's citizenship and the location of his death. *See* 18 U.S.C. §§ 242 & 1119. They "conducted site visits and analysis and consulted with the International Boundary and Water Commission concerning jurisdictional issues." DOJ, Press Release, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca*, Apr. 27, 2012, http://1.usa.gov/1Cu6qy0. But the U.S Department of Justice ultimately declined to prosecute. Among other things, it "concluded that . . . a prosecution under the federal criminal civil rights statutes would be barred because the investigation determined that Hernandez-Guereca was neither within the

borders of the United States nor present on U.S. property, as required for jurisdiction to exist." *Id.*[1]

And Mexican prosecutors, though they had jurisdiction to prosecute Mesa as a formal matter, could not do so in practice: After Mexican authorities charged Mesa with murder, the U.S. refused a request for extradition. Liptak, *An Agent Shot a Boy Across the U.S. Border. Can His Parents Sue?*, N.Y. Times, Oct. 17, 2016, http://nyti.ms/2eaxeMc.

That left the Border Patrol to handle any discipline internally. Federal regulations restrict Border Patrol agents' use of deadly force, requiring that an agent first have "reasonable grounds to believe that such force is necessary to protect [himself or herself] or other persons from the imminent danger of death or serious physical injury." 8 C.F.R. § 287.8(a)(2); *id.* § 287.8(a)(1)(iii). Customs and Border Protection (CBP) has incorporated this requirement into its use-of-force policies—policies the agency did not make publicly available until recently. *See* U.S. Customs & Border Prot., HB 4500-01C, *Use of Force Policy, Guidelines and Procedures Handbook* (May 2014), http://1.usa.gov/1nADcFv; Ortega & O'Dell, *Deadly border agent incidents cloaked in silence.*

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[1] At the time the petition for certiorari in this case was filed, the United States had never brought a criminal prosecution against a Border Patrol agent for a cross-border shooting. But, before the Solicitor General filed his brief in opposition in this Court, the United States brought the first such prosecution, apparently concluding that jurisdiction was proper under the federal murder statute. *United States v. Swartz*, No. 15-CR-1723, Dkt. 1 (D. Ariz. Sept. 23, 2015). The case is currently set for trial on February 21, 2017. Dkt. 38 (D. Ariz. July 25, 2016); *see also* App. 153a (parallel civil case).

Despite these restrictions, Border Patrol agents have used deadly force in a number of "highly questionable" instances in recent years, and have done so with impunity. Ortega & O'Dell, *Deadly border agent incidents cloaked in silence.* An investigation conducted by the *Arizona Republic* revealed that agents and CBP officers "killed at least 42 people" from 2005 to 2013, "all but four of which [were killed] along or near the southwest border." *Id.; see also* Frey, *Over the Line*, Wash. Monthly, May/June 2013, http://bit.ly/2gCJ4xF (concluding, after extensive investigation, that "over the past five years U.S. border agents have shot across the border at least ten times, killing a total of six Mexicans on Mexican soil," even though "[f]atal shootings by Border Patrol agents were once a rarity" and just "a handful were recorded before 2009").

Yet, "[i]n none of the 42 deaths is any agent or officer publicly known to have faced consequences—not from the Border Patrol, not from [CBP] or Homeland Security, not from the Department of Justice, and not, ultimately, from criminal or civil courts." Ortega & O'Dell, *Deadly border agent incidents cloaked in silence.* "Internal discipline," moreover, "is a black hole." *Id.* "If an investigation is undertaken internally, it is not made public. If an agent is disciplined, that is not made public either. If CBP refers a case to the Justice Department for a potential criminal investigation, that, too, is kept from the public." Frey, *Over the Line* ("Of the nineteen cases we have uncovered over the past two years in which people died at the hands of Border Patrol agents—six on Mexican soil—no agents have yet been prosecuted. If any of the agents involved have been relieved of their duties because of their role in the incidents, that information has not been made available to the public.").

This "lack of accountability" and "culture of secrecy about agents' use of deadly force" has persisted notwithstanding increased outside scrutiny. Ortega & O'Dell, *Deadly border agent incidents cloaked in silence.* In 2013, the Police Executive Research Forum—"an independent group of law enforcement experts" commissioned by CBP—studied 67 shootings that occurred from 2010 to 2012 (nearly a third of them fatal). Bennett, *Border Patrol absolves itself in dozens of cases of lethal force*, L.A. Times, June 15, 2015, http://lat.ms/1HK7SN5. The report "criticized the Border Patrol for a 'lack of diligence' in investigating its deadly incidents," *id.*, and concluded that "[t]oo many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force." U.S. Customs and Border Prot., *Use of Force Review: Cases and Policies* 6 (Feb. 2013), http://1.usa.gov/1nKOBQS.

The Border Patrol initially tried to keep the report secret, refusing even to give Congress a copy until it was leaked to the Los Angeles Times. *See* Bennett, *Border Patrol absolves itself in dozens of cases of lethal force.* The agency subsequently conducted a separate review of the same 67 cases—only this time internally—and in 2015 "absolved agents of misconduct in all but three cases, which are still pending." *Id.* Keeping to "its tradition of closing ranks around its paramilitary culture," the Border Patrol disciplined only two agents for these shootings—and "[b]oth received oral reprimands." *Id.*

B. Procedural history

Six months after Sergio Hernández's death, his parents sued Agent Mesa in federal district court, alleging

that the agent had violated the Fourth and Fifth Amendments to the U.S. Constitution. App. 151a.[2]

Agent Mesa moved to dismiss, arguing that Sergio lacked any constitutional protection because he "was an alien without voluntary attachments to the United States" who was "standing in Mexico when he was killed." *Id.* at 113a-14a. Mesa did not attempt to justify his actions or claim that they were reasonable in light of the circumstances, nor did he claim to have had knowledge—at the time of the shooting—of the facts that, in his view, were constitutionally dispositive: Sergio's citizenship, the nature of his attachments to the U.S., and his precise location along the border.

1. The district court dismissed all claims. *Id.* at 119a, 139a-40a. It concluded that the Constitution's deadly-force protections, as applied to non-citizens like Sergio, stop at the border. *Id.* at 116a-18a. The district court declined to follow this Court's decision in *Boumediene*, calling it "inapposite" because it "says nothing of the Fourth Amendment." *Id.* at 114a. Applying a formalistic test instead, the court refused to recognize constitutional protection because Sergio "was standing underneath the Mexican side of the Paso Del Norte Bridge when Agent Mesa shot him." *Id.* at 131a. The court also dismissed the Fifth Amendment claim, concluding that "*all* claims that officers have used excessive force" may be considered under the Fourth Amendment only. *Id.* at 118a.

2. A divided panel of the Fifth Circuit affirmed in part and reversed in part. *Id.* at 54a-108a. First, the panel held that the Fifth Amendment (but not the

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[2] The family also brought several tort claims against the United States, all of which were dismissed and are not at issue here.

Fourth Amendment) applies extraterritorially. *Id.* at 71a-89a. Specifically, two judges determined that the district court's formalistic analysis "no longer represents the Supreme Court's view" after *Boumediene*, which held that "practical considerations" and objective factors "govern[] the application of constitutional principles abroad." *Id.* at 66a-67a. Judge Prado explained that *Boumediene* "appears to repudiate the formalistic reasoning of [the] sufficient connections test" in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), in favor of the "'practical and functional' test articulated in Justice Kennedy's [*Verdugo-Urquidez*] concurrence." App. 75a-76a. And Judge Dennis stressed that a formalistic reading of *Verdugo-Urquidez* "cannot be squared with the Court's later holding in *Boumediene*." *Id.* at 105a. Judge DeMoss, by contrast, distinguished *Boumediene* on its facts and took the view that the Constitution should not apply "because there is a border between the United States and Mexico," and Agent Mesa shot Sergio after he ran across it. *Id.* at 107-08a.

The panel further held that Mesa is not entitled to qualified immunity because "[n]o reasonable officer" would think it permissible to kill an unarmed teenager just because he happened to be an alien with no significant voluntary connections to the U.S. who was standing outside the border—facts Mesa did not know when he pulled the trigger. *Id.* at 103a.

Last, the panel held that a *Bivens* remedy was appropriate in this context. It concluded that there was "no question that [Sergio's survivors] lack any alternative remedy for their Fifth Amendment right"—and, importantly, the lack of an alternative remedy was not "as a result of Congress's deliberate choice." *Id.* at 91a-92a. Moreover, no "special factors" counseled against recog-

nizing a damages remedy because the case does not concern U.S. immigration policy. *Id.* at 93a. For those in the Hernández family's shoes "it is a *Bivens* remedy or nothing." *Id.* at 94a.

3. Rehearing the case en banc, the Fifth Circuit produced a per curiam opinion. Because the court was "divided on the question whether Agent Mesa's conduct violated the Fifth Amendment," and "[r]easonable minds can differ" about whether *Boumediene*'s functional approach requires applying constitutional protection here, the court chose not to decide the Fifth Amendment question. *Id.* at 5a-6a. Instead, the court held that Mesa is entitled to qualified immunity—even assuming that he "showed callous disregard" for Sergio Hernández "by using excessive, deadly force when Hernández was unarmed and presented no threat"—because he was not "reasonably warned" by the "case law" that "his conduct violated the Fifth Amendment." *Id.* at 5a.

As to the Fourth Amendment, the court held that "pursuant to *United States v. Verdugo-Urquidez*," Sergio "cannot assert a claim under the Fourth Amendment" because he was "a Mexican citizen who had no 'significant voluntary connection' to the United States" and "was on Mexican soil at the time he was shot." *Id.* at 4a. The court did not discuss any other factor, including whether applying the Fourth Amendment in this case would be "impracticable and anomalous"—a factor that Justice Kennedy found critical in *Verdugo-Urquidez* when he concluded that "the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." *See* 494 U.S. at 278 (Kennedy, J., concurring). Several judges disagreed with the en banc court's formalistic Fourth Amendment test. App. 31a, 42a, 50a.

4. The Hernández family petitioned this Court for certiorari on the extraterritoriality and qualified-immunity questions. The Government of Mexico filed a brief in support of the petition, explaining that "Mexico considers it important that the United States make available an effective remedy to individuals on Mexican territory seeking redress for unjustified violence by U.S. border officers." Mexico Cert. Br. 7. After inviting the Solicitor General to express the views of the United States, this Court granted the petition and added a third question: "Whether the claim in this case may be asserted under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)."

SUMMARY OF ARGUMENT

I.A. This Court in *Boumediene* held that "*de jure* sovereignty" is not and has never been "the only relevant consideration in determining the geographic reach of the Constitution" because "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. That "century-old" approach focuses on whether application of a particular constitutional provision, in a particular context, would be "impracticable and anomalous." *Id.* at 759-60.

The Fifth Circuit did not apply anything resembling this Court's functionalist approach. It did not consider *any* practical concerns and instead applied the formalism of four Justices in *Verdugo-Urquidez*. But Justice Kennedy's concurrence in *Verdugo-Urquidez* expressly rejected a formalist analysis, instead "applying the 'impracticable and anomalous' extraterritoriality test" (as *Boumediene* put it, 553 U.S. at 760). And that test was limited to "the Fourth Amendment's warrant requirement"—not its prohibition on the unjustified use of deadly force. *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

B. Functional factors strongly favor applying constitutional protection in this context, where a U.S. officer standing on U.S. soil killed an unarmed teenager at close range, without justification. The right to life is fundamental. Sergio Hernández was an unarmed civilian and a member of an intertwined, binational border community. He was playing in an enclosed culvert, just steps from the formal boundary line when he was killed. U.S. border agents are a permanent presence at the border, and the Executive has sole control over their actions. Foreign relations with Mexico would be improved, not hurt, by extraterritorial application. And providing protection would prevent, rather than produce, anomalies.

II. The Fifth Circuit also erred in holding that Agent Mesa is entitled to qualified immunity. That holding turns on one thing, and one thing only: Sergio's status as "an alien who had no significant voluntary connection to, and was not in, the United States" when he was killed. App. 5a. But those facts came to light only afterward; Mesa was not aware of them when he pulled the trigger. This Court has consistently held that qualified immunity is "evaluated from an *ex ante* perspective." *Saucier v. Katz*, 533 U.S. 194, 204 (2001). It considers the objective reasonableness of the officer's conduct based on the information available to him at the time. And that is the only rule that advances the aims of the doctrine: ensuring fair notice while protecting the public. Conferring immunity based on later-discovered facts, by contrast, would erect a rule untethered to the purposes of the doctrine. It would threaten to deny or grant immunity based on facts unrelated to the reasonableness of the officer's conduct at the time. Here, no reasonable officer in Mesa's shoes would have thought it lawful to open fire on an unarmed civilian posing no threat to anyone.

III. Finally, recognizing a cause of action here falls within the heartland of *Bivens* jurisprudence. *Bivens*

inferred a cause of action for damages in part to ensure a remedy for egregious Fourth Amendment violations like the one alleged here. But a cause of action under *Bivens* also exists to vindicate the Supremacy Clause's promise to keep the Executive within constitutional bounds—in this case, to prevent more unlawful killings and to protect our basic right to be free from excessive force. *See Bivens*, 403 U.S. at 408 (Harlan, J., concurring in the judgment). Without a federal damages remedy, there would be no remedy at all for the government's unjustified killing of an unarmed fifteen-year-old boy, and no judicial check on the Executive in this context. With no *Bivens* action for an unlawful killing, Fourth Amendment protections would be "merely precatory," *Davis v. Passman*, 442 U.S. 228, 242 (1979), and the promise of the Supremacy Clause and the Constitution's guarantee of the rule of law ring hollow. Nor do "special factors" militate against a *Bivens* remedy here. Because a judicial remedy neither implicates national security nor jeopardizes international diplomacy, the only question is whether this Court wants to leave this family with *Bivens* or "nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment).

ARGUMENT

I. The Fourth Amendment's prohibition on the unjustified use of deadly force applies to a cross-border shooting of an unarmed Mexican civilian in an enclosed area patrolled by federal agents.

The last time this Court considered extraterritorial application of a constitutional provision, it rejected the argument that, "as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." *Boumediene*, 553 U.S. at 755. Instead, the Court surveyed its extraterritoriality jurisprudence and held that

"questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764.

That same approach governs this case. The Fifth Circuit, however, concluded otherwise and instead assigned dispositive weight to the formalist analysis embraced by four Justices in *Verdugo-Urquidez*. But that approach would effectively limit *Boumediene* to its facts. And it ignores Justice Kennedy's concurring opinion in *Verdugo-Urquidez*, which "appl[ied]" a functional "extraterritoriality test" to the Fourth Amendment's warrant requirement—the same test later adopted by the Court in *Boumediene*. *Id.* at 760.

Under that test, the Fourth Amendment's separate prohibition on the unjustified use of deadly force applies in the narrow context presented in this case: a close-range shooting by a U.S. border agent standing on U.S. soil. There is nothing impracticable or anomalous about applying constitutional protection here. To the contrary, not doing so would create a lawless border zone, handing the Executive unchecked power to use lethal force on innocent civilians just outside our gates.

A. "Objective factors and practical concerns, not formalism," determine whether the Fourth Amendment applies.

1. The functionalist approach this Court articulated in *Boumediene* stretches back more than 100 years. It is embodied in cases arising out of different continents and centuries, and it extends to a wide array of constitutional provisions. Taken together, these cases repudiate the Fifth Circuit's strict sovereignty-based test.

At "the dawn of the 20th century," in what came to be known as the *Insular Cases*, this Court began developing its extraterritoriality jurisprudence by addressing whether the Constitution "applies in any territory that is not a State." *Boumediene*, 553 U.S. at 756. *See, e.g.*, *De*

Lima v. Bidwell, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Haw. v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904). Adopting a pragmatic approach, this Court articulated "the doctrine of territorial incorporation," under which "certain fundamental personal [constitutional] rights" (but not all constitutional rights) apply to noncitizens in unincorporated territories. *Boumediene*, 553 U.S. at 757-58. "[N]oting the inherent practical difficulties of enforcing all constitutional provisions 'always and everywhere,'" the Court instead considered each provision individually, sensitive to the specific concerns presented in each case. *Id.* at 759 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)).

Functional considerations proved similarly "decisive" half a century later in *Reid v. Covert*, 354 U.S. 1 (1957), which held that the spouses of American servicemen living on military bases abroad were entitled to trial by jury. *Boumediene*, 533 U.S. at 760. Although the plurality opinion rested primarily on the petitioners' status as American citizens, two concurring opinions—"votes [that] were necessary to the Court's disposition"—instead relied on "practical considerations" unrelated to citizenship. *Id.* Justice Frankfurter's concurrence rejected the "broad principle" that the Constitution has no application beyond the "limits of the United States," endorsing a flexible approach that looks at the "specific circumstances of each particular case." *Reid*, 354 U.S. at 54. Justice Harlan likewise rejected a "rigid and abstract rule," opting instead for pragmatic consideration of "the particular circumstances, the practical necessities, and the possible alternatives" presented, as well as whether enforcement would be "impractical and anomalous." *Id.* at 75. "The question is one of judgment," he explained, "not compulsion." *Id.*

"Practical considerations [also] weighed heavily" in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which denied access to the writ of habeas corpus to "enemy aliens" imprisoned "in Germany during the Allied Powers' post-war occupation." *Boumediene*, 553 U.S. at 762. The Court's opinion "stressed the difficulties" of granting this right and the "practical barriers" it would pose. *Id.* at 762-63. Although the opinion includes language suggestive of "a formalistic, sovereignty-based test," *Boumediene* "reject[ed] this reading," concluding instead that "practical considerations" were "integral" to *Eisentrager*'s outcome. *Id.* at 762-63. Had *Eisentrager* adopted a "bright-line test," *Boumediene* emphasized, its holding would have been "inconsistent" with this Court's "functional approach to questions of extraterritoriality." *Id.* at 763-64. "*De jure* sovereignty is a factor that bears upon which constitutional guarantees apply" to a noncitizen, but it is not "the only relevant consideration in determining the geographic reach of the Constitution." *Id.* at 764.

Finally, *Boumediene* drew on Justice Kennedy's concurrence in *Verdugo-Urquidez*. Justice Kennedy expressly disagreed with the formalist reasoning of the four other Justices who joined the *Verdugo-Urquidez* opinion, and instead "appl[ied]" Justice Harlan's "'impracticable and anomalous' extraterritoriality test" to a warrantless search abroad. *Id.* at 760. Justice Kennedy listed several "conditions and considerations" that "would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous," including "[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials." *Verdugo-Urquidez*, 494 U.S. at 278. These practical considerations, he concluded, "all indi-

cate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country," so federal agents need not "obtain a warrant when searching the foreign home of a nonresident alien." *Id.*

Boumediene observed that the "common thread uniting" this Court's extraterritoriality cases is their shared recognition that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. Even if some cases could be read to suggest that constitutional protection of noncitizens necessarily stops where "*de jure* sovereignty" ends, the Court refused to read its cases "to conflict in this manner." *Id.*

Having rejected a "formal sovereignty-based test," *Boumediene* applied a functional framework and held that detainees in Guantánamo Bay, Cuba, are "entitled to the privilege of habeas corpus." *Id.* at 764, 771. The Court based its conclusion on objective factors and practical considerations, and found that the benefits of extraterritorial application outweighed the "costs to holding the Suspension Clause applicable," which were not "dispositive." *Id.* at 754, 769.

2. The Fifth Circuit's decision departs from this longstanding functional approach. The court did not consider any of the pragmatic and context-specific considerations *Boumediene* identified as central to the extraterritoriality analysis. Nor did it ask whether applying constitutional protection to a close-range, cross-border shooting would be "impracticable and anomalous"—an inquiry *Boumediene* emphasized as critical, drawing on Justice Kennedy's concurrence in *Verdugo-Urquidez* and Justice Harlan's concurrence in *Reid*. Instead, the Fifth Circuit relied on selective portions of the Court's opinion in *Verdugo-Urquidez* that did not represent the views of a majority of the Court. *Verdugo-*

Urquidez held that the Fourth Amendment does not apply "to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." 494 U.S. at 261. The Court based this holding primarily on the Fourth Amendment's use of the phrase "the people," and reasoned that Verdugo-Urquidez "had no voluntary connection with this country that might place him among 'the people.'" *Id.* at 273.

That reasoning, however, does not control this case. Although Justice Kennedy joined the *Verdugo-Urquidez* opinion (thus supplying the fifth vote), and did not believe that his views "depart[ed] in fundamental respect from the opinion of the Court," he wrote separately to explain why he disagreed with the formalist approach of the other four Justices who joined the majority in full. 494 U.S. at 275. He could not "place any weight on the reference to 'the people' in the Fourth Amendment." *Id.* at 276. Instead, he focused on pragmatic considerations specific to the particular issue before the Court: whether "adherence to [the] warrant requirement" abroad would be "impracticable and anomalous." *Id.* at 278.

By extending *Verdugo-Urquidez*'s "significant voluntary connection" test beyond the warrant requirement—without asking whether extraterritorial application would be "impracticable and anomalous" under the circumstances—the Fifth Circuit disregarded the "common thread uniting" this Court's cases and flouted *Boumediene*. 553 U.S. at 764. Under this Court's precedent, the Fourth Amendment's applicability to a deadly shooting at the U.S.-Mexico border "turn[s] on objective factors and practical concerns, not formalism." *Id.*

B. Objective factors and practical concerns strongly favor applying Fourth Amendment protection in this context.

Boumediene identified "at least three factors" relevant to the functional analysis: (1) "the citizenship and status" of the person claiming protection, (2) the "nature" and "physical location" where the alleged violation "took place," and (3) the "practical obstacles inherent" in applying protection. *Id.* at 739, 766. To these can be added a fourth: whether the right asserted is "a fundamental precept of liberty," such as "freedom from unlawful restraint." *Id.* at 739. Applying these factors here generates a clear answer: The Fourth Amendment protects noncitizens against the arbitrary use of deadly force at the border, at least in the context of a close-range, cross-border shooting in a confined area patrolled by federal agents.

1. ***The right to life is the most basic precept of liberty.*** The most "fundamental personal rights" are the most deserving of protection beyond our formal borders. *Id.* at 758; *see Reid*, 354 U.S. at 51-53 (Frankfurter, J., concurring in the judgment); *Downes*, 182 U.S. at 282-83. A person's "fundamental interest in his own life need not be elaborated upon." *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). It is enough to say that "[t]he intrusiveness of a seizure by means of deadly force is unmatched"; that preventing arbitrary, extrajudicial killing is of paramount concern to any civilized society; and hence that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Id.* at 7, 9. The right asserted here is as fundamental as they come.

2. ***Sergio was a civilian in a neighboring country and part of a shared border community.*** The case for extraterritoriality here is stronger than in *Boumediene*

with respect to the citizenship and status of the person asserting the right. Unlike the plaintiffs there, Sergio Hernández was not an alleged enemy combatant from halfway around the globe, but an unarmed civilian teenager from a friendly, neighboring nation. As President George W. Bush once said, "the United States has no more important relationship in the world than the one we have with Mexico"—"a relationship of unprecedented closeness and cooperation." *Remarks by President Bush and President Fox*, N.Y. Times, Sept. 5, 2001, http://nyti.ms/2fk865q. And Sergio's relationship to this country was closer still, for he was a member of the El Paso-Juarez shared border community—"one of the largest binational regions in the world, with 2.5 million people." Semuels, *Crossing the Mexican-American Border, Every Day*, The Atlantic, Jan. 25, 2016, http://theatln.tc/2g6UOKn.

3. ***U.S. agents exercise permanent, unaccountable power at the border.*** Physical location and degree of control likewise tilt in favor of extraterritorial application in this case. First, the challenged governmental conduct took place entirely inside the territorial jurisdiction of the United States—an area where the U.S. government has complete control, and where U.S. courts serve as a check on the unlawful exercise of governmental power. Second, the injury caused by that conduct occurred "within feet" of U.S. sovereign territory. App. 84a. Sergio was playing in an enclosed culvert heavily patrolled by federal agents, and had just crossed the invisible borderline from the U.S. side when Agent Mesa fired his weapon. Had Agent Mesa pulled the trigger a few seconds earlier, Sergio would have been in the United States.

Third, the cities separated by the culvert—El Paso and Juarez—have been inextricably linked for centuries, and remain so today. For many years they were just one

city; only in 1848 did the Treaty of Guadalupe Hidalgo split them into two. But the cities continue to form a single metropolitan area, share a central business district, and are connected in countless other ways. OECD Regional Stakeholders Committee, *The Paso del Norte Region, U.S.-Mexico: Self Evaluation* (2009), http://bit.ly/2fLcE6M; *see also* Rice, *Life on the Line* ("Unless you are right here, I don't think you can get how intertwined this community is."). To highlight just one: The Paso del Norte bridge, which spans the culvert where Sergio was shot and is jointly owned by the two nations, marks the daily commute for thousands of people. *See* Texas Dep't of Transp., *Texas-Mexico International Bridges and Border Crossings* (2013), http://bit.ly/2gLBqDE. Among them are "Mexican elementary kids heading to U.S. public schools, U.S. residents working in Ciudad Juarez," and students living in Juarez "attending U.S. colleges and universities" in El Paso, Semuels, *Crossing the Mexican-American Border*—many paying in-state tuition, Rice, *Life on the Line*. "[Up] to 1,000 kids legally cross the Paso Del Norte Bridge from Juarez to El Paso to go to school every day." Barron-Lopez, *El Paso is Fighting to Reclaim the Border's Soul*, Huffington Post, Aug. 9, 2015, http://huff.to/2fFzxa4

Because of the deep interconnectedness of the two communities, locals on both sides—including "the mayors [who] represent these two cities"—regard the separation as "more or less a fiction." Leeser & Mocken, *President Obama: Castner Connects The Past And Future*, Huffington Post, Aug. 17, 2016, http://huff.to/2fVay0A. Similar sentiments prevail in border communities across the Southwest, in part because the U.S. has long "wielded military, political, and economic authority over northern Mexico." Bitran, Boumediene *at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 Harv.

C.R.-C.L. L. Rev. 229, 244-48 (2014); *see* Glover, *Two Sides of a Border, One Community*, Aspen Institute, June 1, 2016, http://bit.ly/2fogXVo ("The American and Mexican communities that live at the border are united by common geography, history, language, and aspirations."); St. John, *Line in the Sand: A History of the U.S.-Mexico Border* 93 (2011) (describing history of "[b]order towns, where border-straddling buildings and binational activity" make it "difficult to distinguish between U.S. and Mexican space").

Finally, as this case illustrates, U.S. border agents routinely carry out their duties right next to, and even across, the formal U.S. border. Their presence—and the power they exercise—is not "transient," but "constant." *Boumediene*, 553 U.S. at 768-69; *see* App. 85a-86a. The Chief of the U.S. Border Patrol has acknowledged that U.S. border-security policy "extends our zone of security outward, ensuring that our physical border is not the first or last line of defense, but one of many." Testimony of Michael J. Fisher, Chief, United States Border Patrol, DHS, Feb. 15, 2011, http://bit.ly/2ghjpuk. That policy has resulted in agents firing weapons across the border with increasing frequency. In one recent five-year span, border agents "shot across the border at least ten times, killing a total of six Mexicans on Mexican soil." Frey, *Over the Line*. And because none of those agents set foot in Mexico, and the possibility of extradition is illusory, they are not "answerable to" any other sovereign. *Boumediene*, 553 U.S. at 768. So even if the "United States has no formal control or de facto sovereignty over the Mexican side of the border, the heavy presence and regular activity of federal agents across a permanent border without any shared accountability weigh in favor of recognizing some constitutional reach." App. 86a.

4. ***Protecting against unreasonable deadly force at the border would be practicable, avoid anomalous results, and provide a check on Executive power.*** Most importantly, this case triggers none of the factors that make extraterritorial application of constitutional rights "impracticable and anomalous." *Boumediene*, 553 U.S. at 760. Border patrol officers are already prohibited from using deadly force—on anyone, anywhere—if unnecessary to prevent "the imminent danger of death or serious physical injury," 8 C.F.R. § 287.8(a)(2)(ii). So applying constitutional protection in this context "would not force agents to change their conduct" to conform to new standards. App. 88a. It would simply create an enforcement mechanism for rules already in place, thereby promoting consistency and uniform standards.

The government's certiorari-stage brief did not even assert that applying constitutional protection here would be impracticable or anomalous. It instead suggested that doing so would be unnecessary because extradition or criminal proceedings are possible. U.S. BIO 12. Yet it did not cite a single instance in which the United States has extradited a border officer to face charges stemming from on-duty incidents. And the lone example it gave of a domestic criminal prosecution was "the first Border Patrol agent to be prosecuted by the Department of Justice for a cross-border shooting" in history, and the indictment was issued two months after the petition was filed in this case. Binelli, *10 Shots Across the Border*, N.Y. Times, Mar. 3, 2016, http://nyti.ms/21KKuXM. Assuming such prosecutions might continue, they only confirm that there is no pragmatic reason to deny constitutional protection. If cross-border shootings fall within the "jurisdiction of the United States" under the federal murder statute, 18 U.S.C. § 1111(b), then why shouldn't the constitutional prohibition on unjustified deadly force also apply? The government hasn't said. It offered a

vague reference to diplomacy (at 13), but the only foreign nation affected supports a remedy in this case. Mexico Cert. Br. 7. Applying constitutional protection would thus prevent, not provoke, "friction with the host government." *Boumediene*, 553 U.S. at 770.

If anything, it would be anomalous *not* to afford constitutional protection here. On the government's theory, the Fourth Amendment applies if a border agent (a) kills an American citizen on either side of the border, (b) kills a foreign citizen with significant voluntary connections on either side of the border, or (c) kills a foreign citizen on the U.S. side of the border. Only if the victim happens to be a foreign citizen without significant voluntary connections, standing on the Mexican side of the border, would the Fourth Amendment not apply. And even in that scenario, the government believes that the agent could be criminally prosecuted. Such a patchwork regime might benefit Agent Mesa, but allowing "the applicability of the Fourth Amendment" to "turn on [such] fortuitous circumstance[s]" has little to recommend it. *Cf. Verdugo-Urquidez*, 494 U.S. at 272.

Nor would applying Fourth Amendment protection in this case subject activities like U.S. surveillance in Mexico or elsewhere to constitutional scrutiny. "This case addresses only the use of deadly force by U.S. Border Patrol agents in seizing individuals at and near the United States-Mexico border." *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1037 (D. Ariz. 2015). It does not involve extraterritoriality of the Fourth Amendment more broadly. Nor does it implicate national-security concerns, "divert the attention of military personnel from other pressing tasks," *Boumediene*, 553 U.S. at 769, or interfere with immigration-related activities. *See* App. 36a (Prado, J., concurring) ("This is not a case involving a drone strike, an act of war on a distant battlefield, or law-enforcement conduct occurring entirely within an-

other nation's territory."); Bitran, Boumediene *at the Border?*, 49 Harv. C.R.-C.L. L. Rev. at 257 ("[T]he case has no bearing on Congress's power to decide which noncitizens will be admitted to the United States.").

The Fourth Amendment, moreover, has a built-in mechanism to address unique concerns that may arise in the cross-border context: the substantive standard of reasonableness. Although some judges expressed concern below about the "line drawing" inherent in functionalism, App. 8a, courts have experience drawing lines in Fourth Amendment cases. This Court's cases, for example, already recognize that the border is not just a formal line, but includes "functional equivalents," which take into account objective factors like proximity to the border as well as practical concerns. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973) (holding that roving patrol units "at least 20 miles north of the Mexican border" were not considered the "functional equivalents of border searches"); *United States v. Martinez-Fuerte*, 428 U.S. 543, 550 (1976) (holding that a less-intrusive permanent Border Patrol checkpoint "65-90 miles from the nearest points of the Mexican border" was justified by practical concerns). Nor is this mode of analysis unique to the border. Ordinary search-and-seizure jurisprudence, through the doctrine of curtilage, recognizes that Fourth Amendment protection does not stop at the building's edge. This doctrine requires courts to consider such factors as "the proximity of the area claimed to be curtilage" and "whether the area is included within an enclosure," *United States v. Dunn*, 480 U.S. 294, 301 (1987), and has its origins in a case where the curtilage extended to the length of a "cannon-shot" from Fort Leavenworth, *United States v. Stone*, 69 U.S. (2 Wall.) 525, 534 (1864). The Court can draw upon this familiar doctrine to conclude that the Fourth Amend-

ment's protection against unreasonable lethal force extends at least the length of a gunshot from the border.

While the costs of recognizing a Fourth Amendment right here are minimal, the costs of denying it are high. "If the Constitution does not apply here, the only check on unlawful conduct would be that which the Executive Branch provides"—either through extradition, criminal proceedings, or internal discipline (none of which have yet proved up to the task). App. 87a-88a. At best, that regime "would permit a striking anomaly in our tripartite system of government," allowing the Executive to operate "without legal constraint" beyond that which is self-imposed, while damaging our relationship with an important ally and border partner. *Boumediene*, 553 U.S. at 765. At worst, it would create "perverse and disturbing incentives" for border officers, in effect telling them that if they simply ensure that Mexicans are standing on the Mexican side of the border, they can shoot with impunity, free of constitutional constraints. App. 42a. That result would not only resurrect the territorial formalism that *Boumediene* rejected; it would enable the Executive to "switch the Constitution on or off at will," 553 U.S. at 727, producing "zones of lawlessness where the fortuity of one's location at the time of a gunshot would mark the boundary between liability and impunity," App. 42a (Prado, J., concurring). *Boumediene* does not permit that result.

II. Agent Mesa is not entitled to qualified immunity based on facts unknown to him at the time of the shooting.

The Fifth Circuit held that Agent Mesa is immune from liability even if the Constitution applies. It did so despite the fact that his conduct, as alleged, plainly violates even the most permissive standard for exercising deadly force on unarmed civilians—a constitutional norm

that has been clearly established for decades. The court granted immunity on the theory that Mesa was not "reasonably warned" that it was objectively unreasonable to shoot and kill an unarmed teenager because he later turned out to be "an alien who had no significant voluntary connection to, and was not in, the United States" when he was killed. App. 5a. But Mesa "did not know and could not have reasonably known *when he fired the shot* whether Sergio was a U.S. citizen" or had significant voluntary connections to this country. CA5 Supp. Br. 46. And Mesa has never contended otherwise. *See* BIO 6-15. Federal officers are not entitled to qualified immunity based on facts "unknown to the officer at the time of the incident." Pet. i.

A. Qualified immunity should not be granted or denied based on facts unknown to the officer at the time of the incident.

This Court has long recognized that qualified immunity is "evaluated from an *ex ante* perspective." *Saucier*, 533 U.S. at 204. As the Court reiterated just last Term, "[t]he correct inquiry" assesses "the officer's conduct in the 'situation she confronted.'" *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam); *see also Hope v. Pelzer*, 536 U.S. 730, 746 (2002) (assessing officer's conduct "in the situation he confronted"); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (holding that the "relevant question" considers "the information [the officer] possessed" at the time).

The Court has never held to the contrary. It has neither granted nor denied immunity for a constitutional violation based on later-discovered facts. Instead, the Court has consistently put itself in the officer's shoes at the time of the incident and asked whether the officer "acted in an objectively reasonably manner" given the information then available to him. *Messerschmidt v.*

Millender, 132 S. Ct. 1235, 1245 (2012). Thus, in deadly-force cases, the Court has asked what the officer "reasonably understood" the "fact[s]" to be "when [he] fired" his weapon. *Mullenix*, 136 S. Ct. at 312. That inquiry mirrors the substantive constitutional standard, which assesses the reasonableness of the conduct from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," *Graham v. Connor*, 490 U.S. 386, 396 (1989), and considers only "the facts available to the officer at the moment" of the incident, *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990).

Consistent with this approach, lower courts have routinely refused to let litigants "shift[] the focus of the qualified immunity inquiry from the time of the conduct to its aftermath." *Rhodes v. Robison*, 408 F.3d 559, 570 (9th Cir. 2004); *see Al-Turki v. Robinson*, 762 F.3d 1188, 1194 (10th Cir. 2014) ("The main flaw in Defendant's argument is that she is focusing on the facts we now know," but "the pertinent question for determining her entitlement to qualified immunity depends on the facts that were known at the time"; "then-unknown facts did not somehow make her retroactively unable to perceive [the unlawfulness of] her actions."); *Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002) ("[W]e do not use hindsight to judge the acts of police officers; we look at what they knew (or reasonably should have known) at the time of the act."). As the Ninth Circuit explained in a case where immunity was similarly asserted based on the victim's then-unknown legal status, the fact that the person turned out to have been a parolee (and was thus entitled to fewer constitutional protections) "cannot justify" a search that was unlawful based on facts known

at the time of the search. *Moreno v. Baca*, 431 F.3d 633, 642 (9th Cir. 2005).[3]

This *ex ante* rule can cut both ways—sometimes in favor of immunity, sometimes against it. The Ninth Circuit, for example, has granted immunity from liability for a constitutional violation after "identifying what information was available to [the official] at the time he made his decision, as distinguished from" the "information brought to light after the fact and in litigation." *Rudebusch*, 313 F.3d at 519. The court explained that "the relevant inquiry is not whether, in hindsight, [he] acted unreasonably, but instead whether his decision was reasonable in light of the information that he possessed at the time." *Id.* The Eleventh Circuit has similarly recognized that an officer who uses what he reasonably (but mistakenly) believes to be lawful force will not be denied immunity simply because "the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time." *Lee*, 284 F.3d at 1200. But nor will he be entitled to immunity for using objectively unreasonable force "simply because the fortuity of the circumstances protected the plaintiff from suffering more severe physical harm." *Id.*

That approach is the only one that furthers qualified immunity's purposes: balancing "the need to hold public officials accountable when they exercise power irrespon-

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[3] Courts have applied the *ex ante* rule to different factual scenarios and constitutional claims. *See Rhodes*, 408 F.3d at 570 (First Amendment retaliation claim); *Al-Turki*, 762 F.3d at 1194 (Eighth Amendment claim involving prison medic's "choice to ignore" repeated requests for help from inmate "experiencing severe abdominal pain" that later "turned out to be due to kidney stones rather than to a life-threatening condition"); *Rudebusch v. Hughes*, 313 F.3d 506, 519 (9th Cir. 2002) (Equal Protection Clause claim).

sibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231 (2009). Qualified immunity is a judge-made doctrine that seeks to protect officers when they lack "notice [that] their conduct is unlawful," *Saucier*, 533 U.S. at 206, giving them "breathing room to make reasonable but mistaken judgments," *Messerschmidt*, 132 S. Ct. at 1244. But it is not designed to shield wrongdoers from liability when "the unlawfulness of the alleged conduct should have been apparent." *Pelzer*, 536 U.S. at 743. By focusing on the objective reasonableness of an officer's actions based on the information he possessed at the time—an inquiry the Court has called the "touchstone" of the doctrine, *Anderson*, 483 U.S. at 639—qualified immunity represents "the best attainable accommodation of [these] competing values," *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

The Fifth Circuit's holding does not remotely serve the values underlying qualified immunity. It does not adequately deter or redress officials' "lawless conduct," *id.* at 819, because it allows federal agents to escape liability for reasons that did not bear on the reasonableness of the agents' actions at the time they were committed. Officers would be allowed to avoid liability even if they are "plainly incompetent," *Mullenix*, 136 S. Ct. at 308, or exhibit "obvious cruelty," *Pelzer*, 536 U.S. at 745—or even commit murder—"simply because the fortuity of the circumstances" end up creating some uncertainty about what the officer could have known at the time, *Lee*, 284 F.3d at 1200. "[W]hen [he] fired" his weapon, Agent Mesa could not have known that Sergio was a citizen of Mexico, or that, by hiding behind the pillar, he had formally crossed into Mexico. *Mullenix*, 136 S. Ct. at 312. Those facts, therefore, are not relevant to whether Mesa was "on notice" that his conduct was unlawful.

The Fifth Circuit's holding would also expose officials to additional liability because it incorporates consideration of facts not known to the officer at the time. Unless only defendants, not plaintiffs, may rely on later-discovered facts, competent government officials may be subjected to suit based on after-the-fact discoveries about which they could not have known at the time, even if they otherwise acted reasonably. That makes no sense. The correct rule—the one adopted by the other circuits, and the one that is faithful to this Court's qualified-immunity jurisprudence—avoids these outcomes. By doing so, it advances (rather than undermines) the two competing interests at the heart of the doctrine.

The problems with the Fifth Circuit's approach are best illustrated by way of a hypothetical. Recall that Sergio was playing with friends when he was shot. Suppose that Mesa had fired his weapon and killed two of them, rather than just Sergio. Suppose further that the other boy turned out to have been a U.S. citizen—a friend or cousin of Sergio's from across town, say, or one of the half million U.S.-born children living in Mexico. No one has ever claimed that Mesa would be entitled to qualified immunity in that scenario. And for good reason: Is there any doubt that the law does not immunize the intentional killing of unarmed U.S. citizens without any justification ten feet past the border, even if there is no case directly on point? *See United States v. Lanier*, 520 U.S. 259, 271 (1997) ("The easiest cases don't even arise. There has never been [a] case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune."); *Souza v. Pina*, 53 F.3d 423, 426 (1st Cir. 1995) ("[A] state actor cannot murder a citizen."). Mesa should not receive immunity from a civil action brought by one boy but not the other, when the conduct was identical.

Or suppose Mesa had shot Sergio a few seconds earlier, and a land survey later showed that, unbeknownst to Mesa, Sergio was on the U.S. side of the border. Indeed, in one recent cross-border shooting case, the government introduced a survey showing that "the international border ran through [the victim's] body such that the majority of his body was in Mexico upon death." Mot. to Dismiss at 6, *Nino v. United States*, No. 13-469, Dkt. 43-1 (S.D. Cal. Dec. 16, 2014). If Sergio had turned out to be just inside the border (or on the border), the Fifth Circuit's qualified-immunity answer would likely be different. *See Lynch v. Cannatella*, 810 F.2d 1363, 1375 (5th Cir. 1987) (denying immunity because no reasonable officer would think it lawful to inflict "gross physical abuse"—or "summary execution"—on excludable aliens who had just crossed the border "in the absence of some articulable, rational public interest that may be advanced by such conduct"); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 626-27 (5th Cir. 2006) (denying immunity because "*Lynch* plainly confers on aliens in disputes with border agents a right to be free from excessive force, and no reasonable officer would believe it proper to beat a defenseless alien without provocation").

It would be a bizarre immunity jurisprudence that drew such distinctions. If there is a public-policy interest that is vindicated by making immunity turn on after-the-fact determinations about the victim's legal status, ties to the U.S., and precise physical location, it is not obvious, and it has never been articulated by anyone in this litigation. The better approach is the one this Court has consistently taken: making immunity turn on the reasonableness of the officer's actions in light of his knowledge of the facts and law at the time of the incident.

B. Agent Mesa is not entitled to qualified immunity.

Rather than confront the question presented, the government attempted to rewrite it to focus on whether Sergio had a "clearly established" constitutional right. U.S. BIO I. But that is not the question, and it misapprehends the nature of the "clearly established" inquiry. That inquiry asks whether 'it would [have been] clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*'" *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015) (emphasis added)); *see Hanrahan v. Doling*, 331 F.3d 93, 99 (2d Cir. 2003) ("[C]ourts have repeatedly declined to frame the clearly established inquiry through the '20/20 vision of hindsight.'"). The Fifth Circuit, however, did not ask whether Mesa violated clearly established law based on what he knew (or reasonably should have known) in the situation he confronted, but instead used hindsight and asked whether he violated clearly established law based on what the facts *later turned out to be.*

That was error. Under the proper analysis, Mesa is not entitled to qualified immunity based on the allegations in the complaint because no reasonable officer would have believed it was lawful to kill an unarmed civilian who posed no threat to anyone. *See* App. 142a (alleging that Sergio "was defenseless, was offering no resistance, had no weapon of any kind, and had not nor was threatening Mesa, or any third party, with harm, deadly or otherwise"). Few things are as clearly established as the principle that an officer "may not seize an unarmed, nondangerous suspect by shooting him dead." *Garner*, 471 U.S. at 11. That is true whether viewed through the rubric of the Fourth Amendment or the Fifth Amendment. *See Torres v. City of Madera*, 648 F.3d 1119, 1128 (9th Cir. 2011); *K.H. Through Murphy v.*

Morgan, 914 F.2d 846, 848 (7th Cir. 1990) (Posner, J.) ("One of the less controversial aspects of the due process clause is its implicit prohibition against a public officer's intentionally killing a person, or seriously impairing the person's health, without any justification.").

Mesa would like an exemption from this clearly established prohibition on unjustified deadly force because no reasonable officer would have known that Sergio was a Mexican national with no substantial ties to the U.S. Roughly one million U.S. citizens live in Mexico, including more than 500,000 children, many of whom were born in American border cities like El Paso, but whose families are Mexican and reside across the border in Mexico. *See* U.S. State Department, *U.S. Relations With Mexico: Fact Sheet* (July 2016), http://1.usa.gov/1cogco2; Gomez Licon, *U.S.-born kids lose basic rights in Mexico*, Associated Press, July 18, 2012, http://bit.ly/1JbJNzq. Sergio could have been one of those children, playing with his friends on a summer day. Or he could have been one of the twenty million U.S. residents who visit Mexico every year, many from border communities. *U.S. Relations With Mexico*. Or one of the nearly 9,000 students who "live in Mexico and attend private and public high schools, conservatories, seminars or colleges in the United States under F-1 student visas." Bartenstein, *Students Commute From Mexican Border Town for U.S. Education*, N.Y. Times: Student Journalism Institute, May 29, 2015, http://bit.ly/1RNfjFw. Had Sergio been any of those people, Mesa would not have known.

Nor would it have been reasonable for Mesa to engage in racial profiling to assume Sergio was not one of these people. Millions of people with Sergio's skin tone are U.S. citizens, or have significant connection to the United States. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975) ("Large numbers of native-born and naturalized citizens have the physical characteristics

identified with Mexican ancestry."). And this Court has rejected the contention that, "in the areas adjacent to the Mexican border, a person's apparent ancestry alone justifies [the] belief that he or she is an alien." *Id.* at 877.

Nor are Border Patrol agents trained to take any of these facts into account when deciding whether to use lethal force. They are required by law to focus on objective risk factors in making that determination—not the citizenship of the subject, whether they have significant connections to the U.S., or whether they happen to be on one side of the border as opposed to the other. *See* 8 C.F.R. §§ 287.8(a)(1)(iii) & (2). These regulations are "[r]elevant to the question" whether Mesa had "fair warning" of the "wrongful character of [his] conduct," regardless of whether they were treated by Border Patrol agents as "merely a sham" they "could ignore . . . with impunity." *Pelzer*, 536 U.S. at 743-44.

Having been trained to comply with these regulations (as well as the Fourth Amendment), and lacking information about Sergio's legal status, a reasonable officer in these circumstances "could be expected to know" that killing an unarmed civilian teenager without justification "would violate statutory or constitutional rights" and restrain himself accordingly. *Harlow*, 457 U.S. at 800. In fact, this is a case where the wrongfulness of the conduct is "obvious." *Pelzer*, 536 U.S. at 745. The allegations, if proved, would constitute murder and violate international law. *See* 18 U.S.C. § 1111; Tex. Penal Code § 19.02; Restatement (Third) of Foreign Relations Law of the United States § 702(c) & comment (f) (1987). It would turn the doctrine on its head to grant the officer qualified immunity based on later discoveries about citizenship, voluntary connections, and precise physical location—especially where "the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits." *Lee*, 284 F.3d at 1199-1200.

III. *Bivens* provides a damages remedy against Agent Mesa for the unlawful shooting of Sergio Hernández.

A federal damages action provides the Hernández family with their only possible remedy for a federal agent's unjustified killing of their fifteen-year-old boy, and the sole means to ensure that the Constitution and the rule of law remain supreme. The alternative is deeply unsettling: Without a *Bivens* remedy, the family would have no recourse against the federal agent who killed their son, and no mechanism would exist to test the legality of the agent's lethal action. Such a ruling would discard 45 years of established law that *Bivens* provides an action to review the Executive's use of force against civilians. Nor do any special factors counsel hesitation against providing the Hernández family with a federal damages remedy to raise their excessive-force claim. No national-security or international-diplomacy concerns militate against that remedy here.

A. The constitutional system of separated powers preserves federal courts' ability to infer a federal damages remedy for the Hernández family's excessive-force claim.

1. The constitutional system of separated powers reflects the Framers' understanding that power should not be concentrated and unchecked in one branch of government: they knew "that pendular swings to and away from individual liberty were endemic to undivided uncontrolled power." *Boumediene*, 553 U.S. at 742. The federal judiciary is integral to this system because it has the ultimate duty to ensure that both the executive and legislative branches abide by constitutional limits on their authority. Presenting the Bill of Rights to Congress, James Madison explained:

> If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive.

1 Annals of Cong. 439, 457 (1789) (Joseph Gales ed., 1834); *see also The Federalist No. 78* (Alexander Hamilton) (explaining that federal judges would "guard the Constitution and the rights of individuals"); *Davis*, 442 U.S. at 241 ("[T]he judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced."). The judiciary's power to inquire into whether public officials have exceeded constitutional limits preserves both the supremacy of the Constitution and the rule of law itself. *See* Gwyn, *The Meaning of the Separation of Powers* 42-43, 105-06 (1965) (documenting historical evidence that our separation of powers was intended to ensure the "impartial rule of law").

As Justice Harlan emphasized, the "judiciary['s] ... particular responsibility to assure the vindication of constitutional interests" is the basis for the *Bivens* damages remedy. *Bivens*, 403 U.S at 407 (Harlan, J., concurring in the judgment); *see also id.* at 392 (majority opinion) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."). *Bivens* ensures not only that victims of constitutional torts receive redress for concrete harm but also that the judiciary is able to safeguard the Bill of Rights and the separation of powers.

2. Inferring a damages remedy in this case follows directly from *Bivens*, which held that, even though "the Fourth Amendment does not in so many words provide

for its enforcement by an award of money damages," the Constitution itself does. 403 U.S. at 396. In *Bivens* itself, as here, the claim was that federal agents had deployed "unreasonable force" in violation of the Fourth Amendment. *Id.* at 389. This Court held that federal courts, as the primary guarantors of constitutional rights, "may use any available remedy to make good the wrong done," at least where there are "no special factors counseling hesitation." *Id.* at 396.

The Hernández family's claim thus lies in the heartland of *Bivens*: federal officers violated Sergio's Fourth Amendment right to be free of unreasonable (indeed deadly) force, and the family has no viable alternative to a damages remedy arising from the Constitution. In *Bivens*, as Justice Harlan aptly observed, it was "damages or nothing." 403 U.S. at 409-10. The same is true here: It is *Bivens* "or nothing" to provide some measure of redress for the death of the Hernández's fifteen-year-old son. *Id.* at 409.

A damages action against Agent Mesa is compelled here by the same imperative that drove *Bivens*—the federal judiciary's solemn duty to protect individual liberties from encroachment by the other branches. *See id.* at 407. It is precisely *because* of "the judiciary['s]" "particular responsibility to assure the vindication of constitutional interests" that a federal court must not "await express congressional authorization" before providing relief for a federal agent's use of excessive force against civilians. *Id.* Sidelining the courts wouldn't just deprive victims of a remedy; it would undermine the judiciary's duty—fundamental in our constitutional order and the Supremacy Clause—to make good on the rule of law. *See id.*

3. This Court's "30 years of *Bivens* jurisprudence" likewise reinforces that a damages remedy is available here. *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). The Court has recognized *Bivens* actions in two circumstances: (1) "to provide an otherwise nonexistent cause of action against *individual officers*," or (2) to "provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct." *Id.* at 68-70. In *Davis v. Passman*, for example, the Court permitted a damages remedy under the Fifth Amendment's Due Process Clause for claims that a congressman discriminated on the basis of gender in congressional hiring. 442 U.S. at 230-31. As in *Bivens*, the petitioner had "no effective means other than the judiciary to vindicate these rights," and the Court recognized that petitioners "must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Id.* at 242-43. Similarly, in *Carlson v. Green*, the Court supplied a *Bivens* remedy for a prisoner's Eighth Amendment "deliberate[] indifferen[ce]" claim because there otherwise was no action against the individual officer to deter further constitutional violations. 446 U.S. 14, 16 (1980).

By contrast, this Court has seen no need to infer a damages remedy in other cases where would-be plaintiffs had alternative paths to redress. *See Malesko*, 534 U.S. at 68-70 (collecting cases). For example, this Court's most recent *Bivens* decision declined to allow a constitutional cause of action that fell "within the scope of traditional state tort law," because, in those circumstances, state-law tort suits against private defendants "provide[d] an 'alternative, existing process' capable of protecting the constitutional interests at stake." *Minneci v. Pollard*, 132 S. Ct. 617, 623 (2012) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).

The Court's cases thus form a consistent pattern. Federal courts may hear a *Bivens* action if, without one, a victim of a constitutional violation would be left with "nothing," and no special factors counsel hesitation. *See id.* (citing *Chappell v. Wallace*, 462 U.S. 292, 304 (1983) and *United States v. Stanley*, 483 U.S. 669, 681 (1987)). While the Court has reviewed a series of cases in which recognizing a *Bivens* action was not "necessary or appropriate," the judiciary remains an important backstop for ensuring the vindication of constitutional interests where, as here, it is *Bivens* "or nothing." 403 U.S. at 407, 410 (Harlan, J., concurring in the judgment).

B. Sergio's family has no alternative remedies and would be left without any redress.

In evaluating whether to recognize a *Bivens* remedy, the Court "question[s] whether any alternative, existing process for protecting the constitutionally recognized interest amounts to a convincing reason" to not "provid[e] a new and freestanding remedy in damages." *Minneci*, 132 S. Ct. at 621 (quoting *Wilkie*, 551 U.S. at 550). A *Bivens* claim may be unnecessary when an alternative remedy could redress the constitutional violation and deter future misconduct. *See id.*

Sergio's family has no alternative remedy here. The government does not point to even a "roughly similar" remedy in state law or congressional enactments. *See id.* at 625; U.S. BIO 19. That is unsurprising. No congressional scheme provides—or precludes—a remedy for the constitutional harms petitioners have suffered. *See Bush v. Lucas*, 462 U.S. 367, 385-86 (1983). Nor can the Hernández family hold Agent Mesa accountable in state court. *See* Westfall Act, 28 U.S.C. § 2679(b)(1) (preempting state-law tort claims against federal employees); *Minneci*, 132 S. Ct. at 623. Indeed, the government's unsuccessful attempts to identify even a plausible alter-

native remedy only reinforce the point that, here, it is *Bivens* "or nothing."

1. The government's best shot is its insistence that the Federal Tort Claims Act (FTCA) displaces a *Bivens* remedy. *See* U.S. BIO 21. But this Court held long ago that it is "crystal clear" that "Congress views [the] FTCA and *Bivens* as parallel, *complementary* causes of action," not as mutually exclusive. *Carlson*, 446 U.S. at 19-20 (emphasis added). True, this Court recently described the FTCA as the "exclusive remedy for most claims against Government employees arising out of their official conduct." *Hui v. Castaneda*, 559 U.S. 799, 806 (2010). But "most claims" does not mean constitutional claims because "Congress also provided an exception for constitutional violations." *Id.* at 806-07; 28 U.S.C. § 2679(b)(2)(a) ("the exclusiveness of [a] remedy" under the FTCA "does not extend or apply to a civil action . . . which is brought for the violation of the Constitution").

In any event, the FTCA does not displace a *Bivens* claim here because the statute does not provide a "roughly similar" remedy. *Minneci*, 132 S. Ct. at 625; *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). The FTCA does not waive the federal government's sovereign immunity from "[a]ny claim arising in a foreign country," 28 U.S.C. § 2680(k), so petitioners have no statutory remedy. *See* App. 4a, 60a-63a; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704-05 (2004) (holding that the FTCA's foreign-country exemption bars claims "for injury or harm occurring in a foreign country," even if the harms resulted from a constitutional violation committed in the United States).

Congress's choice not to offer a remedy under the FTCA for claims "arising in a foreign country" does not deprive federal courts of the authority to infer *Bivens* actions. *See* U.S. BIO 21. The FTCA expressly preserves

all constitutional claims, no matter where they occur, so the territorial scope of the FTCA's waiver for non-constitutional claims has no bearing on the existence of a *Bivens* remedy. *See Hui*, 559 U.S. at 806-07; Pfander & Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117 (2009). And, as this Court explained in *Sosa*, when the FTCA was passed, the "dominant principle" in tort law was to apply the law of the place where the injury occurred. 542 U.S. at 705. The FTCA's "foreign country" exception "codified Congress's 'unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power.'" *Id.* at 707 (quoting *United States v. Spelar*, 338 U.S. 217, 221 (1949)). That concern doesn't arise where, as here, U.S. constitutional law, not foreign law, applies.

2. The government's attempt to pose other potential remedies only highlights that there are none. The government initially argued before the court of appeals that the only remedy for injuries occurring abroad is the Foreign Claims Act (FCA)'s "administrative claims process." 10 U.S.C. § 2734(a)(3). *See* U.S. CA5 En Banc Br. 52. But the FCA's remedies—which are entirely discretionary—are not remotely applicable here because they allow the Secretaries of the Armed Forces to redress only military harm "caused by, or . . . otherwise incident to noncombat activities of, the armed forces." 10 U.S.C. § 2734(a)(3). No one alleges there was any military involvement in this case, and the government has apparently abandoned this argument.

When it opposed certiorari, the United States shifted gears, suggesting that Mexican courts should handle petitioners' claim. *See* U.S. BIO 8 ("[T]he Mexican courts have jurisdiction over any tort or crime arising from a fatal injury in Mexico."). This proposal is even less persuasive. Any recovery (even if theoretically possible in a Mexican civil court applying Mexican tort law against an

absent foreign officer) would require a U.S. court to then enforce a Mexican money judgment against the U.S. officer. *See* Mexico Cert. Br. 11. That is not a viable alternative. *See* 28 U.S.C. § 2679(b)(1) (barring "proceeding[s] for money damages" against federal agents for torts committed within scope of employment).

Nor is the possibility of a criminal prosecution enough to displace a *Bivens* remedy. *See* U.S. BIO 8 (noting that there is one pending criminal prosecution in an analogous case). This Court has never viewed the possibility that the federal executive branch, in its discretion, might bring a criminal prosecution against one of its own as a replacement for *Bivens*. *Cf. City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) (explaining ways "[t]he fox-in-the-henhouse syndrome is to be avoided"). In any case, it is a nonissue here because the United States has refused to bring charges against Agent Mesa or to extradite him to Mexico for criminal proceedings.

C. No "special factors" militate against recognizing a *Bivens* action.

Even in the absence of alternative remedies, "a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation.'" *Wilkie*, 551 U.S. at 550 (quoting *Bush*, 462 U.S. at 378). As "special factors counseling hesitation," the United States gestures toward extraterritoriality in general and national security and international diplomacy in particular. U.S. BIO 20-21. Assuming such concerns might weigh against recognizing a remedy in some cases, they do not counsel hesitation here.

1. The point of the "special factors" inquiry is to identify circumstances in which sensitive separation-of-powers considerations compel federal courts to refrain from permitting a damages remedy that Congress has not expressly authorized. *See, e.g.*, *Wilkie*, 551 U.S. at 550; *FDIC v. Meyer*, 510 U.S. 471, 486 (1994); *Stanley*, 483 U.S. at 683; Bernstein, *Congressional Will and the Role of the Executive in* Bivens *Actions: What Is Special About Special Factors?*, 45 Ind. L. Rev. 719 (2012).

For example, this Court has found "factors counseling hesitation . . . in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice." *Chappell*, 462 U.S. at 298, 300. But the Court's "special" concern for military discipline was not an ad hoc judicial policy choice; it was, consistent with *Bivens*, grounded in the separation of powers. Specifically, "the Constitution explicitly conferred upon Congress the power, *inter alia*, '[t]o make Rules for the Government and Regulation of the land and naval Forces,' U.S. Const. art. I, § 8, cl. 14, thus showing that 'the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment." *Stanley*, 483 U.S. at 679 (quoting *Chappell*, 462 U.S. at 301).

By contrast, respondents have not identified any constitutionally grounded concerns counseling hesitation here. The government's argument that extraterritoriality considerations counsel hesitation merely recycles its argument that the Fourth and Fifth Amendments did not protect Sergio from an unlawful killing in the first place. There is no reason to "double count" extraterritoriality and allow respondents' argument on the claims' merits to serve as grounds to deny a cause of action to enforce that claim. *See* App. 97a; *Davis*, 442 U.S. at 246

(special factors counseling hesitation do not apply when coextensive with protections afforded by preceding constitutional inquiry). Regardless, these considerations are no more persuasive in this context than as reasons to limit the constitutional guarantee against the Executive's use of excessive force.

2. Whether "national security" is a special factor that counsels hesitation is a context-specific inquiry that provides no basis to deny a *Bivens* remedy here. In this case, we are not challenging policy decisions in either the national security or immigration arenas. *See* U.S. Br. at 24, *Ashcroft v. Abbasi* (No. 15-1359) ("High-level policy decisions differ from the unauthorized actions of rogue officers in a way that bears directly on special-factors analysis."); App. 93a ("Quite plainly, even though Agent Mesa is an immigration law enforcement officer, . . . this is not an immigration case."). Nor does this call for any judicial assessment of, or interference with, "[t]he Department of Homeland Security and . . . U.S. Customs and Border Protection['s] . . . primary mission of preventing terrorist attacks within the United States and securing the border." U.S. BIO 20 (citing 6 U.S.C. §§ 111, 202). We argue only that a border patrol agent could not, without any justification, shoot petitioners' fifteen-year-old son while he hid behind a pillar a few feet into Mexican soil. And the government does not point to specific policies, priorities, or threats that would be compromised by enforcing the Fourth Amendment's bar on excessive force here. How could it? Existing border patrol regulations bar exactly the conduct in which Agent Mesa engaged. *See* 8 C.F.R. § 287.8(a)(2); *id.* § 287.8(a)(1)(iii); *Boumediene*, 553 U.S. at 797 ("Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch.").

The same is true of the government's "international diplomacy" concerns that, if anything, militate in favor of allowing a federal remedy in this case. Here, Mexico has made clear that recognizing a cause of action in this case would not "interfere with ... Mexico's sovereignty." Mexico Cert. Br. 9-10. Mexico wants "to see that the United States has provided adequate means to hold the agents accountable and to compensate the victims," and "[t]he United States would expect no less if the situation were reversed." *Id.* at 2. Because Agent Mesa was inside U.S. territory when he shot Sergio, he "is, for all practical purposes, answerable to no other sovereign for [his] acts." *Boumediene*, 553 U.S. at 770. And leaving a Mexican national without any redress for an unlawful killing only threatens to *harm* relations with Mexico, jeopardize this country's preeminence in protecting the rule of law, and place the United States in contravention of international law. *See* Mexico Cert. Br. 9-16.

3. When isolated from more specific foreign-relations or national-security considerations, "extraterritoriality" itself cannot justify hesitation in recognizing a *Bivens* action. Unable to identify any concrete "special factors," the government falls back on the general canon against interpreting *statutes* to apply extraterritorially. U.S. BIO 21. But the reasons that courts interpret statutes against that background presumption do not apply here. *See, e.g.*, *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247, 255 (2010). First, the presumption "avoid[s] the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016). But any "international discord" in this case comes from the potential *un*availability of civil remedies under U.S. law. *See* Mexico Cert. Br. 8-10. Second, the presumption "reflects the more prosaic 'commonsense notion that Congress generally legislates with domestic concerns in

mind.'" *RJR Nabisco*, 136 S. Ct. at 2100. No similar notion applies to constitutional interpretation, where this Court is not simply acting as the agent of the legislature. So long as the relevant constitutional provisions apply extraterritorially, *see ante* Part I, and so long as their application does not portend undue judicial interference with foreign policy or national security, extraterritoriality, by itself, is no reason to deny judicial recognition of a constitutional remedy. *See Boumediene*, 553 U.S. at 765.

* * *

Declining to recognize a *Bivens* remedy here would break new ground in allowing constitutional harms to go unredressed. Although this Court has not "extended" *Bivens* in over three decades, it has never—outside of the unique military context—left an aggrieved family with "nothing." Instead, the Court has long protected innocent civilians from federal agents' use of excessive force. No less today than when the Court decided *Bivens*, the "judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment." *Bivens*, 403 U.S. at 407 (Harlan, J. concurring in the judgment). And it remains "important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances." *Id.* at 411.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In the Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL., PETITIONERS

v.

JESUS MESA, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

Petitioners brought a civil action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), seeking damages from a U.S. Border Patrol agent who, while standing in the United States, fatally shot a Mexican citizen who was in Mexico. The questions presented are as follows:

1. Whether the claim in this case may be asserted under *Bivens*.

2. Whether the court of appeals erred in holding that the Mexican citizen lacked Fourth Amendment protections.

3. Whether the court of appeals erred in holding that the agent's alleged actions did not violate any clearly established substantive-due-process right under the Fifth Amendment.

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v.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1-50) is reported at 785 F.3d 117. The panel opinion of the court of appeals (Pet. App. 54-108) is reported at 757 F.3d 249. An opinion of the district court (Pet. App. 120-140) is reported at 802 F. Supp. 2d 834.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2015. The petition for a writ of certiorari was filed on July 23, 2015, and was granted on October 11, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court created a common-law cause of action for dam-

ages against federal officials who allegedly violated a U.S. citizen's Fourth Amendment rights by conducting a warrantless search in the United States. In this case, petitioners seek to invoke *Bivens* to recover damages from a U.S. Border Patrol agent for the death of their son, a Mexican national, as the result of a shooting across the international border separating the United States and Mexico. Petitioners allege that the shooting violated standards for the use of force found in the Fourth and Fifth Amendments, and they contend that those constitutional provisions and the judicially created *Bivens* remedy should be extended to aliens injured outside this country.[1]

1. According to the allegations in petitioners' complaint, on June 7, 2010, petitioners' son, Sergio Adrián Hernández Güereca (Hernández), a 15-year-old Mexican national, was with friends in the cement culvert that separates El Paso, Texas, from Ciudad Juárez, Mexico. The international border runs down the middle of the culvert, and there is a fence at the top of the embankment on the U.S. side. Petitioners allege that Hernández and his friends were playing a game in which they crossed the border into the United States, ran up the embankment to touch the fence, and then ran back into Mexico. Pet. App. 144-146.

Petitioners allege that respondent Jesus Mesa, Jr., a U.S. Border Patrol agent, arrived on the scene,

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[1] This brief is filed on behalf of the United States, which was a party to the proceedings in the court of appeals. Pet. App. 1-2. Although petitioners have not sought this Court's review of the aspects of the decision below affirming the dismissal of their claims against the United States and the other entities and individuals represented by the Department of Justice, the United States is a respondent under Supreme Court Rule 12.6.

detained one of Hernández's friends in the culvert on the U.S. side of the border, and then, while standing in U.S. territory, fatally shot Hernández, who was in Mexico at the time and who "had no interest in entering the United States." Pet. App. 146-147. Petitioners further allege that Hernández was "unarmed and unthreatening" at the time. *Id.* at 147.

After a "comprehensive" investigation of the incident, the Department of Justice (DOJ) declined to bring criminal charges against Agent Mesa. DOJ, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca* (Apr. 27, 2012) (*DOJ Statement*).[2] DOJ explained that the shooting "occurred while smugglers attempting an illegal border crossing hurled rocks from close range at [Agent Mesa,] who was attempting to detain a suspect." *Ibid.* DOJ added that its investigation indicated that Agent Mesa "did not act inconsistently with [U.S. Border Patrol] policy or training regarding use of force." *Ibid.* DOJ's statement expressed the United States' regret about Hernández's death, and it reiterated the United States' commitment to investigating and prosecuting allegations of excessive force and "work[ing] with the Mexican government * * * to prevent future incidents." *Ibid.*

2. Petitioners sued the United States, several federal agencies, and unknown U.S. Border Patrol agents, asserting claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*; the Alien Tort Statute (ATS), 28 U.S.C. 1350; and *Bivens*. Pet. App. 122 & n.3. Petitioners later named Agent Mesa as one of the individual defendants, alleging that he violated Her-

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[2] https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca.

nández's Fourth and Fifth Amendment rights while attempting to apprehend him on suspicion of illegal entry into the United States. *Id.* at 151.

a. The district court dismissed petitioners' FTCA and ATS claims. Pet. App. 120-140. Under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, an FTCA claim against the United States is generally the exclusive remedy for torts committed by federal employees within the scope of their employment. 28 U.S.C. 2679(b)(1). In this case, DOJ certified that Agent Mesa and the other individual defendants were acting within the scope of their employment. Pet. App. 125; see 28 U.S.C. 2679(d)(1). Petitioners did not challenge that certification and did not oppose the substitution of the United States as the sole defendant for their FTCA and ATS claims. Pet. App. 125-126.

The FTCA generally makes the United States liable for torts committed by federal employees within the scope of their employment, but excludes "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). That exclusion "bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004). Here, the district court dismissed petitioners' FTCA claims because Hernández was in Mexico when he was shot. Pet. App. 133-134.

The ATS grants district courts jurisdiction over certain suits by aliens "for a tort * * * committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. 1350. The district court dismissed petitioners' ATS claims because no provision of law

waives the United States' sovereign immunity for such claims. Pet. App. 136-137.

b. The district court also dismissed petitioners' *Bivens* claims against Agent Mesa. Pet. App. 109-119. Those claims were not barred by the Westfall Act, which exempts suits "brought for a violation of the Constitution." 28 U.S.C. 2679(b)(2)(A). But the court concluded that petitioners' Fourth Amendment claim was foreclosed by *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 274-275 (1990), which held that the Fourth Amendment had no application to the search and seizure of a Mexican citizen's property in Mexico. Pet. App. 113-117. And the court concluded that petitioners' Fifth Amendment claim was barred by *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), which held that a claim that a law enforcement officer used excessive force in making a seizure can arise only under the Fourth Amendment, not the more general rubric of substantive due process. Pet. App. 117-118.[3]

3. Initially, a three-judge panel of the court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 54-108.[4]

a. The panel held unanimously (albeit based on somewhat different rationales) that the Fourth Amendment did not apply to Agent Mesa's alleged actions because Hernández was in Mexico when he was shot. Pet. App.

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[3] The district court granted summary judgment to the other individual defendants because petitioners failed to offer evidence that the defendants' acts and omissions in supervising Agent Mesa proximately caused Hernández's death. Pet. App. 59-60. Those claims are not at issue here.

[4] The panel affirmed the district court's rejection of petitioners' claims against the United States and the supervisory defendants. Pet. App. 60-65, 104.

71-80 (Prado, J.); *id.* at 105-106 (Dennis, J., concurring in part and concurring in the judgment); *id.* at 106-107 (DeMoss, J., concurring in part and dissenting in part).

b. The panel majority concluded, however, that Agent Mesa's alleged actions violated the Fifth Amendment, which the majority found applicable even though Hernández was in Mexico when he was shot. Pet. App. 80-89. The majority relied on *Boumediene* v. *Bush*, 553 U.S. 723 (2008), which held that the Suspension Clause of the Constitution, Art. I, § 9, Cl. 2, applies to certain aliens detained at the U.S. Naval Station at Guantanamo Bay, Cuba, where the United States lacks "*de jure* sovereignty" but exercises "*de facto* sovereignty" because of "its complete jurisdiction and control over the base." *Boumediene*, 553 U.S. at 754-755. The majority reasoned that *Boumediene* supported the extraterritorial application of the Fifth Amendment here because Hernández was "a civilian killed outside an occupied zone or theater of war," Pet. App. 82-83, and because he was in an area of Mexico near the border where the majority believed the United States exercises a degree of control sufficiently comparable to that which it exercises at Guantanamo Bay, *id.* at 84-86.

The panel majority further held that, although this Court has "consistently refused to extend *Bivens* liability to any new context," petitioners' claim on behalf of an alien injured abroad could be brought under *Bivens*. Pet. App. 89-90 (citation omitted); see *id.* at 89-99. The majority also held that Agent Mesa was not entitled to qualified immunity on petitioners' Fifth Amendment claim. *Id.* at 102-104.

c. Judge DeMoss dissented in part, concluding that "the Fifth Amendment does not protect a non-

citizen with no connections to the United States who suffered an injury in Mexico where the United States has no formal control or de facto sovereignty." Pet. App. 108.

4. The court of appeals granted petitions for rehearing en banc filed by the United States and by Agent Mesa. Pet. App. 51-53. The 15-member en banc court then affirmed the dismissal of petitioners' claims against Agent Mesa without dissent. *Id.* at 1-7.[5]

a. The court first held that petitioners had failed to allege a violation of the Fourth Amendment because Hernández was "a Mexican citizen who had no 'significant voluntary connection' to the United States" and "was on Mexican soil at the time he was shot." Pet. App. 4 (quoting *Verdugo-Urquidez*, 494 U.S. at 271). Only two judges declined to join that reasoning. As at the panel stage, Judge Dennis concurred in the result. *Id.* at 31-32. He concluded that *Boumediene* requires a more pragmatic inquiry than the one he believed this Court applied in *Verdugo-Urquidez*, but he nonetheless determined that the Fourth Amendment is inapplicable here because "judicial entanglement with extraterritorial Fourth Amendment excessive-force claims" would be "impracticable and anomalous." *Id.* at 32. Judge Graves did not dissent from the court's Fourth Amendment holding, but his partial concurrence stated that the court "should carefully adjudicate" that claim. *Id.* at 50.

b. The court was "somewhat divided on the question of whether Agent Mesa's conduct violated the Fifth Amendment," but it was "unanimous" in holding

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[5] The en banc court reinstated the portions of the panel opinion rejecting petitioners' claims against the United States and the supervisory defendants. Pet. App. 4.

that he is entitled to qualified immunity because "any properly asserted right was not clearly established." Pet. App. 5. The court stated that "[r]easonable minds can differ on whether *Boumediene* may someday be explicitly extended" to provide extraterritorial application of the Fifth Amendment to aliens, but it held that "nothing in [*Boumediene*] presages, with the directness that the 'clearly established' standard requires, whether th[is] Court would extend the territorial reach of a different constitutional provision * * * and would do so where the injury occurs not on land controlled by the United States, but on soil that is indisputably foreign and beyond the United States' territorial sovereignty." *Id.* at 6.

c. Several judges filed concurring opinions. Judge Jones, joined by three of her colleagues, agreed with the district court that petitioners' excessive-force claim could arise, if at all, only under the Fourth Amendment, not the Fifth. Pet. App. 10-11. In any event, she would have held that the Fifth Amendment does not apply to aliens abroad. *Id.* at 16-20.

Judge Prado disagreed with Judge Jones about the merits of petitioners' Fifth Amendment claim, but agreed that Agent Mesa is entitled to qualified immunity because the Fifth Amendment's applicability to these circumstances is not clearly established. Pet. App. 32-43.

Judge Haynes, joined by two other judges, wrote separately to address petitioners' ATS claim, which is not at issue here. Pet. App. 43-49. She also observed, however, that petitioners' "concern that people in Mesa's situation can commit wrongful acts with impunity is not accurate." *Id.* at 49 n.5. She noted, for example, that petitioners could have sought "federal-

court review of the Attorney General's scope-of-employment certification," which could have permitted them to pursue ATS claims against Agent Mesa, as well as tort claims under state or Mexican law. *Id.* at 48. She also stated that redress may be available "through Mexican diplomatic channels." *Id.* at 49 n.5; see *id.* at 30 (Jones, J., concurring) (same).

d. Because it rejected petitioners' Fourth and Fifth Amendment claims on other grounds, the en banc court did not consider whether *Bivens* should be extended to this novel context.

SUMMARY OF ARGUMENT

I. In granting certiorari, this Court directed the parties to address the question whether petitioners' claims may be asserted under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). That antecedent question resolves this case: The judicially created *Bivens* remedy should not be extended to aliens injured abroad.

In *Bivens*, this Court recognized an implied private right of action for damages against federal officers alleged to have violated a citizen's Fourth Amendment rights. But because the Court's subsequent decisions have clarified that "implied causes of action are disfavored," the Court has long "been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (citation omitted). And the Court has admonished that *Bivens* should not be extended to any new context where special factors suggest that Congress is the appropriate body to provide any damages remedy.

Petitioners seek to extend *Bivens* to injuries suffered by aliens abroad—a significant and unprecedented expansion. That expansion is inappropriate

because Congress, not the Judiciary, should decide whether and under what circumstances to provide monetary remedies for aliens outside our borders who are injured by the government's actions. An injury inflicted by the United States on a foreign citizen in another country's sovereign territory is, by definition, an incident with international implications. This case illustrates that point: Both the problem of border violence in general and the specific incident at issue here have prompted exchanges between the United States and Mexico, and Mexico's amicus brief confirms its sovereign interest in those issues.

The need for caution before inserting the courts into such sensitive matters of international diplomacy is reinforced by the fact that, in a variety of related contexts—including the statutory remedy for persons deprived of constitutional rights by *state* officials, 42 U.S.C. 1983—Congress has taken care not to provide aliens injured abroad with the sort of judicial damages remedy petitioners seek. Instead, where Congress has addressed injuries inflicted by the government on aliens abroad, it has relied on voluntary payments or administrative claims mechanisms. And the general presumption against extraterritoriality further confirms that *Bivens* should not apply here: It would be anomalous to extend a judicially inferred remedy to a case where the Court would not extend an express statutory cause of action absent a clear indication that Congress intended to reach injuries outside our Nation's borders.

II. The en banc court of appeals held that the Fourth Amendment did not apply to Agent Mesa's alleged conduct because Hernández was an alien located in Mexico who had no connection to the United

States. That conclusion was compelled by *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), which held that the Fourth Amendment had "no application" to the search and seizure of an alien's property in Mexico. *Id.* at 275. This Court reached that conclusion after a careful analysis of the Fourth Amendment's text, purpose, and history, as well as the "significant and deleterious consequences for the United States" that would follow from extending the Fourth Amendment to aliens abroad. *Id.* at 273.

Petitioners do not deny that *Verdugo-Urquidez* forecloses their claim. Instead, they assert that *Verdugo-Urquidez* is no longer good law because it employed an approach to extraterritoriality that purportedly conflicts with Justice Kennedy's concurring opinion in that case and with this Court's subsequent decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008). But Justice Kennedy "join[ed]" the Court's opinion in *Verdugo-Urquidez* and agreed with the "persuasive justifications stated by the Court." 494 U.S. at 275, 278 (Kennedy, J., concurring). And nothing in *Boumediene*—which addressed the application of the right to habeas corpus in an area where the United States maintains de facto sovereignty—undermines either *Verdugo-Urquidez*'s analysis or its holding that the Fourth Amendment generally does not apply to aliens abroad.

In contrast, petitioners' ad hoc, totality-of-the-circumstances approach to the extraterritorial application of the Fourth Amendment finds no support in *Boumediene* or in any other decision of this Court. Petitioners' all-factors-considered test is unworkable; it would upend an understanding on which Congress and the Executive Branch have relied; and it could "significantly disrupt the ability of the political branch-

es to respond to foreign situations involving our national interest," *Verdugo-Urquidez*, 494 U.S. at 273-274.

III. Agent Mesa is entitled to qualified immunity on petitioners' substantive-due-process claim because his alleged actions did not violate any clearly established Fifth Amendment right. To overcome a motion to dismiss based on qualified immunity, a *Bivens* plaintiff must plead facts establishing that "every reasonable official" in the defendant's position would have known that his actions violated the asserted constitutional right. *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citation omitted). The dispositive question here is thus whether "every reasonable official" in Agent Mesa's position "would have understood that what he is doing violates [the Fifth Amendment]." *Ibid.*

Petitioners do not dispute the court of appeals' unanimous conclusion that it was not clearly established that an alien in Hernández's position had Fifth Amendment rights. Instead, petitioners maintain (Br. 28-33) that the court should have conducted the qualified-immunity analysis as if Hernández were a U.S. citizen because Agent Mesa did not know with certainty that he was an alien. Petitioners are correct that the qualified-immunity analysis focuses on facts known to the defendant at the time of the challenged conduct. But it does not follow that the analysis in this case should assume, counterfactually, that Agent Mesa knew Hernández was a U.S. citizen. Instead, the question is whether every reasonable officer in Agent Mesa's position would have known that his alleged actions violated the Fifth Amendment, where the officer did not know Hernández's nationality with certainty but had no reason to believe that he was a U.S. citizen.

The answer to that question is no—both because no case law addresses the application of the Fifth Amendment to uses of force against persons of unknown nationality outside the United States, and because it is not clearly established that the Fifth Amendment (rather than the Fourth Amendment) has any application to such uses of force, regardless of the nationality of the affected individual.

ARGUMENT

I. THE JUDICIALLY CREATED *BIVENS* REMEDY SHOULD NOT BE EXTENDED TO ALIENS INJURED ABROAD

In granting certiorari, this Court directed the parties to address the question whether the claim in this case may be asserted under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The availability of a *Bivens* remedy is "antecedent" to the questions on which petitioners sought this Court's review. *Wood* v. *Moss*, 134 S. Ct. 2056, 2066 (2014). That antecedent question resolves this case. Even if petitioners were correct that the Fourth and Fifth Amendments protected Hernández in Mexico, and even if those rights were clearly established at the time of the incident, petitioners' claims were properly dismissed because *Bivens* should not be extended to aliens injured abroad.

A. This Court Has Consistently Declined To Extend *Bivens* To Contexts Where Congress Is The More Appropriate Body To Craft Any Damages Remedy

1. In *Bivens*, this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Servs. Corp.* v. *Ma-*

lesko, 534 U.S. 61, 66 (2001). The Court held that, despite the absence of such a remedy in the Fourth Amendment itself or in any statute, federal officers could be sued for damages for conducting a warrantless search in the United States. *Bivens*, 403 U.S. at 389. In creating that common-law cause of action, however, the Court emphasized that the context of the case presented "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396.

Since deciding *Bivens* in 1971, this Court has "extended its holding only twice." *Malesko*, 534 U.S. at 70. In *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court allowed a congressional employee to sue for sex discrimination in violation of the Fifth Amendment. *Id.* at 248-249. And in *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court allowed a federal prisoner to sue prison officials for Eighth Amendment violations. *Id.* at 19-23. In each case, the Court reiterated that it found "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 19; see *Davis*, 442 U.S. at 245.

In the more than 35 years since *Carlson*, this Court "ha[s] consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68. Eight decisions of this Court squarely rejected efforts to expand *Bivens*. See *Minneci* v. *Pollard*, 132 S. Ct. 617, 626 (2012); *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007); *Malesko*, 534 U.S. at 74; *FDIC* v. *Meyer*, 510 U.S. 471, 484-486 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412, 429 (1988); *United States* v. *Stanley*, 483 U.S. 669, 683-684 (1987); *Bush* v. *Lucas*, 462 U.S. 367, 390 (1983); *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983). On three other occa-

sions, the Court sua sponte questioned the existence of a *Bivens* remedy even though the parties had not raised the issue. See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009); see also *Wood*, 134 S. Ct. at 2066; *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 n.4 (2012).

This Court's steadfast refusal to extend *Bivens* reflects its changed understanding of the scope of judicial authority to create private rights of action. *Bivens* "rel[ied] largely on earlier decisions implying private damages actions into federal statutes." *Malesko*, 534 U.S. at 67; see *Bivens*, 403 U.S. at 397 (citing *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964)); *Bivens*, 403 U.S. at 402-403 & n.4 (Harlan, J., concurring in the judgment) (same). But in the decades since *Bivens*, the Court has made clear that the creation of damages remedies is a legislative function, and it has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one." *Malesko*, 534 U.S. at 67 n.3. The Court has "repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004). And it has "declined to 'revert' to 'the understanding of private causes of action that held sway'" when *Bivens* was decided. *Malesko*, 534 U.S. at 67 n.3 (citation omitted). The Court has thus explained that its "reluctan[ce] to extend *Bivens*" rests on its more recent decisions clarifying that "implied causes of action are disfavored." *Iqbal*, 556 U.S. at 675.[6]

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[6] In addition to relying on statutory implied-right-of-action cases, Justice Harlan's *Bivens* concurrence argued that federal courts' authority to provide "*equitable* relief against threatened invasions of constitutional interests" suggested that courts have the

2. This Court's decisions establish two hurdles for a party seeking to extend *Bivens*. First, the presence of "any alternative, existing process for protecting the [relevant] interest" may be "a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. Second, "even in the absence of [such] an alternative," inferring a damages remedy under *Bivens* is still disfavored, and a court must determine whether judicially created relief is warranted, "paying particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Ibid.* (citation omitted); see *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 177 (1996) (Souter, J., dissenting) (*Bivens* is "a novel rule that a proponent has a burden to justify affirmatively on policy grounds in every context in which it might arguably be recognized").

The "special factors" that may foreclose the extension of *Bivens* are not limited to factors showing that a damages remedy would be inappropriate in a particular setting. They also include factors suggesting that Congress, not the judiciary, is the appropriate entity to make that legislative judgment—or that Congress's failure to provide a remedy "has not been inadvertent," *Schweiker*, 487 U.S. at 423. The special factors referenced in *Bivens* itself, for example, "related to

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power to fashion *damages* remedies absent congressional authorization. 403 U.S. at 404 (emphasis added). But "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history * * * tracing back to England." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). There is no comparable authority for judicial creation of damages remedies.

the question of who should decide whether [a damages] remedy should be provided," not "the merits of the particular remedy that was sought." *Bush*, 462 U.S. at 380. Consistent with that focus on congressional intent and institutional competence, this Court has asked "whether there are reasons for allowing Congress to prescribe the scope of relief that is made available." *Ibid.* And the Court has "decline[d] to create a new substantive legal liability without legislative aid" if "Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 390 (citation omitted); see *Wilkie*, 551 U.S. at 562; *Schweiker*, 487 U.S. at 425.[7]

B. Congress, Not The Judiciary, Is The Appropriate Body To Decide Whether To Provide A Damages Remedy For Aliens Injured Abroad By U.S. Officials

In asking this Court to create a *Bivens* remedy for an alien injured outside the United States, petitioners "seek[] a significant extension of *Bivens*." *Meyer*, 510 U.S. at 484. An injury inflicted by the U.S. government on a foreign citizen in another country's sovereign territory is, by definition, an incident with inter-

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[7] In 1988, Congress enacted the Westfall Act to protect federal employees from liability for torts committed within the scope of their employment. 28 U.S.C. 2679(b)(1). Congress exempted claims "brought for a violation of the Constitution of the United States." 28 U.S.C. 2679(b)(2)(A). But that exemption cannot be read as an implicit authorization for the expansion of *Bivens* because it was enacted against a backdrop of decisions holding that *Bivens* does not extend to any new context in which Congress, rather than the Judiciary, is the appropriate body to establish a damages remedy. See *Bush*, 462 U.S. at 379-380, 390; see also *Schweiker*, 487 U.S. at 421-423; *Stanley*, 483 U.S. at 679-684; *Chappell*, 462 U.S. at 304.

national implications. Claims based on such injuries thus affect the Nation's foreign affairs—and the nature of the government's activities abroad means that those claims will often implicate national security as well. Those special factors indicate that Congress, not the Judiciary, is the appropriate body to decide whether and under what circumstances to provide monetary remedies. The need for caution is reinforced by the fact that, in a variety of statutes, Congress has long taken care *not* to provide aliens injured abroad with the sort of judicial damages remedy petitioners seek. And the general presumption against extraterritoriality further confirms that *Bivens* should not be extended to this novel context.

1. Claims by aliens injured abroad implicate foreign affairs and national security

a. "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); see, *e.g.*, U.S. Const. Art. I, § 8, Cls. 3, 10, 11, 12, 13; Art. II, § 2. "[F]oreign affairs" is thus "a domain in which the controlling role of the political branches is both necessary and proper." *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1328 (2016). In recognition of the political branches' special competence and responsibility, this Court has long held that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981).

This Court's decisions make clear that *Bivens* should not be expanded to an area that the Constitution commits to the political branches. In *Chappell*, the Court declined to extend *Bivens* to claims by mili-

tary personnel against superior officers because "Congress, the constitutionally authorized source of authority over the military system of justice," had not provided such a remedy. 462 U.S. at 304. The Court explained that "[a]ny action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field." *Ibid.* And in *Stanley*, the Court relied on *Chappell* to hold that *Bivens* does not extend to any claim incident to military service, again emphasizing that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." 483 U.S. at 683.

The same logic precludes the extension of *Bivens* to aliens injured abroad by U.S. government officials. The United States is answerable to other sovereigns for injuries inflicted on their citizens within their territory, and such injuries thus inevitably have implications for foreign affairs. Judicial examination of the government's treatment of aliens outside the United States would inject the courts into sensitive matters of international diplomacy and risk "what [this] Court has called in another context 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'" *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J.) (citation omitted). More generally, "damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad" could carry other "foreign affairs implications" that "cannot be ignored"—including "the danger of foreign citizens' using the courts * * * to obstruct the foreign policy of our government." *Ibid.*

This case illustrates the inevitable foreign-affairs implications of *Bivens* suits by aliens injured abroad. The Government of Mexico has filed an amicus brief explaining (at 3) that it has an interest in this case because, "[a]s a sovereign and independent state, Mexico has a responsibility to maintain control over its territory and to look after the well-being of its nationals." Issues of border violence, including cross-border shootings, have been of great concern to the United States' bilateral relationship with Mexico for several years. In 2014, the two governments established a joint Border Violence Prevention Council to provide a standing forum in which to address issues of border violence.[8] Mexico and the United States have also addressed cross-border shootings in other forums, including the annual U.S.–Mexico Bilateral Human Rights Dialogue.[9] And the incident at issue here has prompted bilateral exchanges, including Mexico's request that Agent Mesa be extradited to face criminal charges. Pet. App. 30; Mexico Amicus Br. 9. The United States declined to extradite Agent Mesa, but it has reiterated its commitment to "work with the Mexican government within existing mechanisms and agreements to prevent future incidents." *DOJ Statement*.

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[8] Dep't of Homeland Security, *Written Testimony for a House Committee on Oversight and Government Reform Hearing* (Sept. 9, 2015), https://www.dhs.gov/news/2015/09/09/written-testimony-dhs-southern-border-and-approaches-campaign-joint-task-force-west.

[9] See Governments of Mexico and the United States of America, *Joint Statement on the U.S.-Mexico Bilateral High Level Dialogue on Human Rights* (Oct. 27, 2016), https://www.state.gov/r/pa/prs/ps/2016/10/263759.htm (listing "the use of force at the border" as among the issues discussed).

Petitioners' suit seeks to insert the Judiciary into this sensitive diplomatic arena, and to have the courts adopt a view of the underlying incident that differs from the one taken by the Executive Branch. See p. 3, *supra*. Judicial involvement in such matters should come, if at all, only at Congress's invitation and under circumstances prescribed by the legislature.

b. Petitioners assert (Br. 47) that there should be no concern about interfering with U.S. foreign policy because the Government of Mexico supports the availability of a damages remedy in this case. But that only illustrates the problem. Petitioners ask this Court to make a judgment about whether the provision of a damages remedy to an alien injured abroad would be consistent with U.S. foreign policy. The Judiciary is ill-suited to make such determinations—and attempting to make them on a case-by-case basis would itself intrude on foreign affairs. See *Stanley*, 483 U.S. at 682 (rejecting "[a] test for liability that depends on the extent to which particular suit would call into question military discipline and decisionmaking" because such a test "would itself require judicial inquiry into, and hence intrusion upon, military matters"). "Congress is in a far better position than a court" to make the delicate judgments involved in providing remedies to aliens abroad who are injured by the government's actions, and to "tailor any remedy" as appropriate. *Wilkie*, 551 U.S. at 562 (citation omitted).

c. Opening the courthouse doors to *Bivens* suits by aliens injured abroad would also have implications for national security. Such suits might, for example, be brought based on military or intelligence activities. See, *e.g.*, *Sanchez-Espinoza*, 770 F.2d at 208. National

security is also implicated where, as here, the security of the border is at issue. The Department of Homeland Security (DHS) and its components, including the U.S. Border Patrol, have been charged by Congress with preventing terrorist attacks within the United States and securing the border. 6 U.S.C. 111, 202. "[T]his country's border-control policies are of crucial importance to the national security and foreign policy of the United States." *United States* v. *Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004), cert. denied, 544 U.S. 950 (2005). Many *Bivens* suits based on injuries to aliens abroad would thus add national-security considerations to the direct implications for foreign affairs inherent in *all* such litigation.[10]

2. Congress's consistent decisions not to provide a judicial damages remedy to aliens injured abroad confirm that a Bivens remedy is inappropriate

A variety of statutes indicate that Congress's failure to provide the judicial remedy petitioners seek "has not been inadvertent." *Schweiker*, 487 U.S. at

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[10] Petitioners contend (Br. 46) that, unlike other cases involving injuries to aliens abroad, this suit does not implicate national security and is instead akin to a matter of domestic law enforcement. But that assertion turns in part on their contested depiction of the facts. See p. 3, *supra*. Activities related to securing the Nation's borders often bear little resemblance to domestic law enforcement, see, *e.g.*, *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 160-164 (1993) (describing the Coast Guard's interdiction of tens of thousands of Haitian migrants), and courts are not well-suited to distinguish between border-protection activities that do and do not implicate national security. In any event, the question is whether special factors counsel against extending *Bivens* to the relevant *category* of cases. See *Wilkie*, 551 U.S. at 550; *Stanley*, 483 U.S. at 682.

423. Those related congressional policy judgments warrant "appropriate judicial deference." *Ibid.*

a. Traditionally, injuries suffered by aliens abroad were addressed through diplomatic negotiations or by voluntary *ex gratia* payments to the injured parties. See William R. Mullins, *The International Responsibility of a State for Torts of Its Military Forces*, 34 Mil. L. Rev. 59, 61-64 (1966); see *id.* at 64 n.22 (describing statutes providing for *ex gratia* payments). The United States continues to rely on such measures in many contexts. See, *e.g.*, Exec. Order No. 13,732, § 2(b)(ii), 81 Fed. Reg. 44,486 (July 7, 2016) (providing for *ex gratia* payments to civilians injured or killed by certain uses of military force).

In certain recurring circumstances, however, Congress has determined that the United States' interests would be better served by establishing administrative claims procedures. In 1942, during World War II, Congress enacted the Foreign Claims Act (FCA), 10 U.S.C. 2734, "[t]o promote and maintain friendly relations" with the increasing number of foreign countries in which U.S. military personnel were stationed. 10 U.S.C. 2734(a). The FCA allows the military to establish administrative claims commissions to pay certain claims for personal injuries, death, or property damage suffered by "any inhabitant of a foreign country" as a result of the noncombat activities of U.S. military forces. *Ibid.*

A companion statute, the International Agreement Claims Act, allows the military to make payments under "an international agreement which provides for the settlement or adjudication and cost sharing of claims against the United States arising out of the acts or omissions of a member or civilian employee of

an armed force of the United States." 10 U.S.C. 2734a(a). Such cost-sharing provisions are included in a number of status-of-forces agreements applicable to U.S. forces stationed abroad. See David P. Stephenson, *An Introduction to the Payment of Claims Under the Foreign and the International Agreement Claims Act*, 37 A.F. L. Rev. 191, 200 & nn.80-83 (1994).

More recently, Congress has enacted limited exceptions to the FTCA's foreign-country exclusion to allow payments for torts arising from the overseas operations of the Department of State, 22 U.S.C. 2669–1, and the Drug Enforcement Administration (DEA), 21 U.S.C. 904. In those statutes, as under the FCA, Congress provided an administrative remedy—it did not permit the injured parties to bring FTCA suits in court. And in establishing and shaping those limited remedies, Congress made considered decisions about which injuries to make compensable and under what conditions they should be compensated. See, *e.g.*, 10 U.S.C. 2734(b) (limitations on FCA claims).

Congress has not adopted a similar claims procedure for aliens injured abroad by the actions of U.S. Border Patrol agents. Instead, Congress has left such injuries to be addressed through diplomatic or other means. But these statutes provide further reason not to infer a *Bivens* remedy because they indicate that Congress has made deliberate choices about the circumstances under which to provide monetary remedies for aliens injured abroad—and because they show that where Congress *has* provided such remedies, it has done so through administrative mechanisms, not by authorizing suits in federal court.

b. Where Congress has provided judicial damages remedies, moreover, it has taken care not to extend

those remedies to injuries of the sort petitioners assert here. The statutory remedy for individuals whose constitutional rights are violated by *state* officials is limited to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." 42 U.S.C. 1983; see *Breard* v. *Greene*, 523 U.S. 371, 378 (1998) (per curiam). Accordingly, if Agent Mesa were a state official, petitioners would have no remedy under Section 1983. See *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998). Petitioners identify no reason why *Bivens*—the "more limited * * * federal analog" to Section 1983, *Hartman* v. *Moore*, 547 U.S. 250, 254 n.2 (2006)—should sweep more broadly.

Similarly, in enacting the FTCA, the most comprehensive statute providing remedies for injuries inflicted by federal employees, Congress specifically excluded "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). That is a strong indication that Congress did not intend a damages remedy for injuries occurring abroad. Petitioners correctly observe (Br. 43) that the foreign-country exception was motivated in part by Congress's "unwillingness to subject the United States to liabilities depending upon the laws of a foreign power," which would have governed FTCA claims arising abroad. *Sosa*, 542 U.S. at 707 (brackets and citation omitted). But petitioners are wrong to suggest that avoiding the application of foreign law was Congress's only goal. Even before DOJ raised concerns about foreign law, the bill that became the FTCA excluded "all claims 'arising in a foreign country *in behalf of an alien*.'" *Ibid.* (quoting H.R. 5373, 77th Cong., 1st Sess. 8 (1941)) (emphasis added). That history demonstrates that Congress's decision not to provide an FTCA remedy to *aliens* injured abroad

reflected adherence to the traditional practice of addressing such injuries through nonjudicial means.

More recently, in the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. 1350 note, Congress created a cause of action for damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another individual to "torture" or "extrajudicial killing." 28 U.S.C. 1350 note § 2. "But the statute exempts U.S. officials, a point that President George H.W. Bush stressed when signing the legislation." *Meshal* v. *Higgenbotham*, 804 F.3d 417, 430 (D.C. Cir. 2015) (Kavanaugh, J., concurring), petition for cert. pending, No. 15-1461 (filed May 31, 2016). "In confining the coverage of statutes such as the [FTCA] and the [TVPA], Congress has deliberately decided not to fashion a cause of action" for aliens injured abroad by government officials. *Ibid.* Congress's repeated decisions not to provide such a remedy counsel strongly against providing one under *Bivens*.[11]

3. *The presumption against extraterritoriality reinforces the inappropriateness of extending* Bivens *to aliens injured abroad*

The presumption against extraterritoriality further confirms that *Bivens* should not be extended to aliens injured abroad. It is a basic principle of our legal

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[11] Petitioners misunderstand the government's reliance on the FTCA and the administrative claims procedures Congress has made available for certain injuries abroad. The point is not, as petitioners suggest (Br. 41-43), that those mechanisms are available here. Rather, it is that Congress has made deliberate choices about whether and under what circumstances to provide remedies for aliens injured abroad, and has conspicuously declined to provide the sort of remedy petitioners seek.

system that, in general, "United States law governs domestically but does not rule the world." *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (citation omitted). In statutory interpretation, that presumption is reflected in the canon that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). That canon "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 133 S. Ct. at 1664.

Petitioners assert (Br. 47) that the presumption against extraterritoriality is relevant only to "interpreting *statutes*," not to defining the scope of a common-law remedy like *Bivens*. But this Court has held otherwise. In *Kiobel*, the Court held that although the presumption "typically" applies to statutory interpretation, "the principles underlying the canon of interpretation similarly constrain courts" recognizing common-law causes of action. 133 S. Ct. at 1664.

Kiobel involved the ATS, a jurisdictional statute that "does not expressly provide any causes of action," but that this Court had previously held is "best read as having been enacted on the understanding that the common law would provide a cause of action for a modest number of international law violations." 133 S. Ct. at 1663 (quoting *Sosa*, 542 U.S. at 724) (brackets omitted). Although the international-law rules asserted by the plaintiffs applied abroad, this Court held that courts recognizing causes of action under the ATS must be guided by the presumption against extraterritoriality. In fact, the Court admonished that "the danger of unwarranted judicial interference in

the conduct of foreign policy is *magnified* in the context of the ATS, because the question is not what Congress has done, but instead what courts may do." *Id.* at 1664 (emphasis added). That danger is still greater in the *Bivens* context, where courts are asked to create a common-law cause of action without even the minimal congressional guidance found in the ATS.

The presumption against extraterritoriality should thus "constrain courts exercising their power" under *Bivens*. *Kiobel*, 133 S. Ct. at 1665. And as this Court recently explained, the presumption counsels against extending a private damages remedy to injuries suffered abroad even if the underlying substantive rule has extraterritorial reach. In *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016), the Court held that some provisions in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, govern foreign conduct. But "despite [its] conclusion that the presumption ha[d] been overcome with respect to RICO's substantive provisions," the Court "separately appl[ied] the presumption against extraterritoriality to RICO's cause of action." *RJR Nabisco*, 136 S. Ct. at 2106. The Court held that the private right of action did not reach injuries suffered abroad—even injuries caused by domestic conduct—because "[n]othing in [RICO] provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States." *Id.* at 2108.[12]

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[12] The Justices who dissented in *RJR Nabisco* "would not [have] distinguish[ed], as the Court d[id], between the extraterritorial compass of a private right of action and that of the underlying proscribed conduct." 136 S. Ct. at 2113 (Ginsburg, J., dissenting). But the dissenting Justices recognized that the situation is differ-

Accordingly, even if Congress had enacted a statute expressly providing a damages remedy for individuals whose constitutional rights are violated by federal officers—and even if petitioners were correct that the Fourth and Fifth Amendments apply in this extraterritorial context—this Court would not extend that statutory remedy to this case absent "clear indication" that Congress intended to reach "injuries suffered outside of the United States." *RJR Nabisco*, 136 S. Ct. at 2108. Given this Court's longstanding reluctance to extend *Bivens*, it would be "grossly anomalous * * * to apply *Bivens* extraterritorially when [courts] would not apply an identical statutory cause of action for constitutional torts extraterritorially." *Meshal*, 804 F.3d at 430 (Kavanaugh, J., concurring).

C. Petitioners Identify No Sound Reason To Extend *Bivens* To The Novel Context Presented Here

Petitioners provide no sound reason to extend *Bivens* for the first time in more than 35 years.

1. Petitioners principally contend (Br. 41-44) that they lack an adequate alternative remedy. But this Court has made clear that while the *presence* of an alternative remedy may preclude the extension of *Bivens*, the "absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Schweiker*, 487 U.S. at 421-422. "[E]ven in the absence of an alternative," a *Bivens* remedy is inappro-

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ent where, as in *Kiobel* and in this case, courts are not interpreting an extraterritorial statute, but are instead asked "to fashion, on their own initiative, claims for relief that operate extraterritorially." *Id.* at 2113 n.2 (citing *Kiobel*, 133 S. Ct. at 1664).

priate if there are "any special factors counselling hesitation." *Wilkie*, 551 U.S. at 550 (citation omitted). And the Court has instructed that "it is irrelevant to a 'special factors' analysis whether the laws currently on the books afford [the plaintiff] * * * an 'adequate' federal remedy for his injuries." *Stanley*, 483 U.S. at 683. The Court has therefore declined to extend *Bivens* even where that result left no "prospect of relief for injuries that must now go unredressed." *Schweiker*, 487 U.S. at 425; see *Stanley*, 483 U.S. at 683.

Moreover, petitioners err in asserting (Br. 1) that the denial of a *Bivens* remedy "creat[es] a legal no-man's land in which federal agents can kill innocent civilians with impunity." DOJ investigates and prosecutes allegations of excessive force by federal law-enforcement officers, including U.S. Border Patrol agents. It is currently prosecuting an agent for murder based on a cross-border shooting. See *United States* v. *Swartz*, No. 15-CR-1723 (D. Ariz. Sept. 23, 2015). The possibility of such prosecutions provides a strong deterrent against the sort of shootings petitioners posit, and a successful prosecution would also result in an order providing restitution for the victim's family. See 18 U.S.C. 3663A(a); *United States* v. *Cienfuegos*, 462 F.3d 1160, 1165-1169 (9th Cir. 2006).

In addition, the United States is answerable to Mexico for any uses of force across the international border, and the two nations continue to work to reduce such incidents. See p. 20 & notes 8-9, *supra*. In conjunction with those bilateral efforts, U.S. Customs and Border Protection (CBP) has revised its training requirements, use-of-force policies, and investigative practices in the six years since the shooting at issue in this case. U.S. Border Patrol agents are subject to

internal review and discipline under regulations promulgated pursuant to a specific congressional directive. See 8 U.S.C. 1357(a)(5); 8 C.F.R. 287.10. In 2014, the CBP revised its use-of-force policy to incorporate recommendations made by DHS's Inspector General and an independent review body. *CBP Releases Use of Force Policy Handbook and Police Executive Research Forum Report* (May 30, 2014).[13] At the same time, CBP undertook "a comprehensive review and redesign of its basic training curriculum." *Ibid.* And as of February 2015, CBP has instituted a new procedure in which specially trained teams including representatives from the DOJ's Civil Rights Division review every incident in which death or serious injury results from the use of force by a CBP officer.[14]

Furthermore, the Westfall Act protects Agent Mesa from state-law tort suits only because DOJ certified that he was acting within the scope of his employment. 28 U.S.C. 2679(b) and (d). Such "scope-of-employment certification[s] [are] reviewable in court." *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995). And although petitioners did not exercise their right to seek judicial review here, tort remedies are available in instances where federal agents act outside the scope of their employment. See, *e.g.*, *Jamison* v. *Wiley*, 14 F.3d 222, 228-235 (4th Cir. 1994) (upholding DOJ's decision to withdraw a scope certification for an

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[13] https://www.cbp.gov/newsroom/national-media-release/cbp-releases-use-force-policy-handbook-and-police-executive-research.

[14] CBP, *Investigations into Deaths in Custody and Use-of-Force Incidents* ii (July 27, 2015), https://www.dhs.gov/sites/default/files/publications/Customs%20and%20Border%20Protection%20(CBP)%20-%20Investigations%20into%20Deaths%20in%20Custody%20and%20Use-of-Force%20Incidents.pdf.

employee who sexually assaulted a co-worker at work); see also 2 Restatement (Third) of Agency § 7.07(2) (2006) ("An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.").

2. Petitioners also assert (Br. 45) that the arguments against extending *Bivens* to aliens injured abroad impermissibly "double count" the considerations militating against extending the underlying constitutional provisions. In their view, if the Fourth and Fifth Amendments apply to aliens abroad, *Bivens* should too. But the whole premise of the special-factors inquiry is that a judicially created damages remedy is *not* appropriate for every constitutional violation—indeed, "in most instances [this Court] ha[s] found a *Bivens* remedy is unjustified." *Wilkie*, 551 U.S. at 550. The question in every new context is whether Congress, rather than the Judiciary, is the appropriate body to "prescribe the scope of relief that is made available." *Bush*, 462 U.S. at 380. Here, a powerful combination of factors shows that the scope of any damages remedy for aliens injured abroad by U.S. officials is "better left to legislative judgment." *Sosa*, 542 U.S. at 727. Those injuries implicate sensitive questions of diplomacy and national security; Congress has consistently withheld the sort of judicial remedy petitioners seek; and the presumption against extraterritoriality confirms that it would be inappropriate to extend a damages remedy beyond our Nation's borders absent legislative guidance.

II. THE FOURTH AMENDMENT DOES NOT APPLY TO ALIENS IN HERNÁNDEZ'S POSITION

The en banc court of appeals held, without dissent, that the Fourth Amendment did not apply to Agent Mesa's alleged conduct because Hernández was an alien in Mexico who had no connection to the United States. That conclusion was compelled by this Court's decision in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), which held that the Fourth Amendment had "no application" to the search and seizure of a nonresident alien's property in Mexico. *Id.* at 275. Petitioners do not deny that *Verdugo-Urquidez* forecloses their claim. And *Verdugo-Urquidez* is entirely consistent with this Court's subsequent decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), which addressed the application of the right to habeas corpus in an area where the United States maintained "*de facto* sovereignty." *Id.* at 755. The Court should therefore decline petitioners' invitation to abandon *Verdugo-Urquidez* in favor of an ill-defined and unworkable totality-of-the-circumstances test for the extraterritorial application of the Fourth Amendment.

A. *Verdugo-Urquidez* Held That The Fourth Amendment Generally Does Not Apply To Aliens Abroad

1. In *Verdugo-Urquidez*, this Court addressed the applicability of the Fourth Amendment to the search and seizure of property located in Mexico and owned by a Mexican citizen. 494 U.S. at 262. Verdugo-Urquidez, a suspected leader of a drug cartel, had been apprehended by Mexican authorities and transported to the United States, where he was held pending trial. *Ibid.* A DEA agent stationed in the United States "arrange[d] for searches of Verdugo-Urquidez's Mexican residences," one of which was in

the border city of Mexicali. *Ibid.* Those searches, which were carried out by DEA agents working with Mexican authorities, resulted in the seizure of evidence implicating Verdugo-Urquidez in the distribution of illegal drugs. *Id.* at 262-263.

The Court framed the question presented as "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." *Verdugo-Urquidez*, 494 U.S. at 261. Although the searches were "arrange[d]" from the United States after Verdugo-Urquidez had been brought to this country, the Court observed that any Fourth Amendment violation "occurred solely in Mexico," the location of the properties subject to the challenged searches and seizures. *Id.* at 262, 264.

In holding that the Fourth Amendment had "no application" to such searches and seizures, *Verdugo-Urquidez*, 494 U.S. at 274-275, the Court conducted a comprehensive analysis using a variety of interpretative methods. It began by noting that the text of the Fourth Amendment codifies a right held by "the people." U.S. Const. Amend. IV. Although the Court viewed the text as "by no means conclusive," it stated that the Framers' use of that term, in contrast with the broader language found in the Fifth and Sixth Amendments, suggests that the Fourth Amendment protects "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265.

The Court placed greater weight on "the history of the drafting of the Fourth Amendment," which shows that "its purpose was to restrict searches and

seizures which might be conducted by the United States in domestic matters." *Verdugo-Urquidez*, 494 U.S. at 266. After reviewing that history, the Court concluded that "it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States." *Ibid.*

The Court also found "no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters." *Verdugo-Urquidez*, 494 U.S. at 267. The Court noted, for example, that in 1798 Congress authorized privateers to seize French vessels, "but it was never suggested that the Fourth Amendment restrained the authority of Congress or of United States agents to conduct operations such as this." *Id.* at 267-268.

The Court then surveyed more than a century of case law and observed that aliens had been afforded constitutional protections only when "they ha[d] come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez*, 494 U.S. at 271. The Court concluded that although Verdugo-Urquidez was being held in the United States at the time of the challenged searches, he could not claim Fourth Amendment protection under the logic of those decisions because he was "an alien who has had no previous significant voluntary connection with the United States." *Ibid.*

Finally, the Court emphasized that extending the Fourth Amendment to aliens abroad "would have significant and deleterious consequences for the United States." *Verdugo-Urquidez*, 494 U.S. at 273. The

Court noted that "[t]he United States frequently employs Armed Forces outside this country * * * for the protection of American citizens or national security." *Ibid.* And it warned that the application of the Fourth Amendment to such uses of force "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Id.* at 273-274.

The Court described the obvious harms that would follow if "aliens with no attachment to this country" could "bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters." *Verdugo-Urquidez*, 494 U.S. at 274. But the Court also cautioned that even if *Bivens* were "deemed wholly inapplicable in cases of foreign activity," extraterritorial application of the Fourth Amendment to aliens would still "plunge [the political branches] into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad." *Ibid.* The Court concluded that any restrictions on such searches and seizures "must be imposed by the political branches through diplomatic understanding, treaty, or legislation." *Id.* at 275.

2. For more than a quarter century, this Court and others have understood *Verdugo-Urquidez* to establish that the Fourth Amendment generally does not apply to searches and seizures of aliens outside the United States. See, *e.g. Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (citing *Verdugo-Urquidez* for the proposition that "[i]t is well established that certain constitutional protections available to persons inside

the United States are unavailable to aliens outside of our geographic borders").[15]

That rule forecloses petitioners' Fourth Amendment claim. Petitioners' complaint alleges that Hernández "was a citizen of the Republic of Mexico" and that, at the time of the shooting, he was "on his native soil of Mexico" and "had no interest in entering the United States." Pet. App. 145-147. Hernández thus lacked even the connection to this country held by *Verdugo-Urquidez*, who was lawfully present in the United States when the challenged searches occurred. 494 U.S. at 271-272; see Pet. App. 78.[16] Accordingly, petitioners "cannot assert a claim under the Fourth

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[15] See also, *e.g.*, *United States* v. *Mohamud*, 843 F.3d 420, 439 (9th Cir. 2016); *United States* v. *Emmanuel*, 565 F.3d 1324, 1331 (11th Cir.), cert. denied, 558 U.S. 1099 (2009); *In re Terrorist Bombings*, 552 F.3d 157, 168 (2d Cir. 2008), cert. denied, 558 U.S. 1137 (2010); *United States* v. *Bravo*, 489 F.3d 1, 9 (1st Cir.), cert. denied, 552 U.S. 939 and 552 U.S. 965 (2007); *United States* v. *Davis*, 905 F.2d 245, 251 (9th Cir. 1990), cert. denied, 498 U.S. 1047 (1991).

[16] *Verdugo-Urquidez* held that a nonresident alien's lack of a "previous significant voluntary connection with the United States" excluded him from the protection of the Fourth Amendment even though he had been brought to the United States at the time of the searches. 494 U.S. at 271; see *ibid.* (stating that "aliens receive constitutional protections when they have come within the territory of the United States *and* developed substantial connections with this country") (emphasis added). The Court had no occasion to consider whether an alien who had developed a significant voluntary connection with the United States would be entitled to Fourth Amendment protection while *outside* U.S. territory. That question likewise is not presented here, because Hernández, like the defendant in *Verdugo-Urquidez*, was a "citizen and resident of Mexico with no voluntary attachment to the United States." *Id.* at 274-275.

Amendment" as interpreted in *Verdugo-Urquidez*. Pet. App. 4.

B. Neither Justice Kennedy's Concurring Opinion Nor This Court's Subsequent Decision In *Boumediene* Undermines *Verdugo-Urquidez*'s Holding

Petitioners do not dispute that the rule announced by this Court in *Verdugo-Urquidez* forecloses their Fourth Amendment claim. They also do not attempt to make the showing that this Court demands before overruling one of its precedents. Instead, petitioners assert (Br. 14-27) that *Verdugo-Urquidez* is no longer good law because its purportedly "formalist" approach is inconsistent with the approach to extraterritoriality they contend is reflected in Justice Kennedy's concurrence in that case and the Court's subsequent decision in *Boumediene*. Petitioners are mistaken.

1. Justice Kennedy "join[ed]" "the opinion of the Court" in *Verdugo-Urquidez*, including its holding that the Fourth Amendment generally does not apply to aliens abroad. 494 U.S. at 275 (Kennedy, J., concurring). Justice Kennedy also made clear that his views did not "depart in fundamental respects" from the opinion he joined. *Ibid.*

Justice Kennedy's only expressed disagreement with the Court concerned its reliance "on the reference to 'the people' in the Fourth Amendment." *Verdugo-Urquidez*, 494 U.S. at 276. In all other respects, Justice Kennedy agreed with the Court's analysis, which looked to the "general principles of interpretation" he regarded as controlling, *ibid.*—including the history and purpose of the Fourth Amendment, *id.* at 266; the contemporary understanding of the Framers, *id.* at 267; and the "deleterious consequences" that would follow from the extraterritorial application

of restrictions on searches and seizures developed to constrain domestic law enforcement, *id.* at 273-275. Justice Kennedy endorsed these "other persuasive justifications stated by the Court." *Id.* at 278. And he agreed with the Court that "the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." *Id.* at 275.[17]

2. Petitioners likewise err in asserting that *Boumediene* implicitly overruled *Verdugo-Urquidez*. *Boumediene* held that the Suspension Clause applies to certain aliens detained by the United States at the Guantanamo Bay Naval Station, where the Court concluded that the United States exercises "complete jurisdiction and control" equivalent to "*de facto* sovereignty." 553 U.S. at 755, 763. The Court rejected the government's argument that the United States' lack of *de jure* sovereignty established that the Suspension Clause had no application at Guantanamo Bay, stating that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764.

Based on the history of the Suspension Clause and this Court's prior decisions, *Boumediene* concluded that the reach of the Clause should be determined based on three factors specifically keyed to that provision's protection of the right to use habeas corpus to test the legality of executive detentions: "(1) the citizenship

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[17] In contrast, Justice Stevens concurred only in the judgment, and did so based on his more limited conclusions that the Fourth Amendment's Warrant Clause does not apply to aliens abroad and that the searches at issue satisfied the Fourth Amendment's reasonableness standard. *Verdugo-Urquidez*, 494 U.S. at 279.

and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." 553 U.S. at 766.

In applying that framework to hold that the petitioners in *Boumediene* were protected by the Suspension Clause notwithstanding their alienage and location outside the *de jure* sovereignty of the United States, the Court repeatedly relied on the fact that "[i]n every practical sense Guantanamo is not abroad" because "it is within the constant jurisdiction of the United States." 553 U.S. at 768-769; see *id.* at 747, 753-754, 764-765, 769, 771 (describing U.S. authority at Guantanamo Bay as "total military and civil control," "complete jurisdiction and control," "complete and uninterrupted control * * * for over 100 years," and "complete and total control"). The Court also emphasized the historic function of the Suspension Clause as a judicially enforceable limit on executive detention. As the Court explained, the Suspension Clause "was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights," and the Clause serves as "an essential mechanism in the separation-of-powers scheme." *Id.* at 739, 743.

3. *Boumediene* thus rested crucially on two factors: the United States' de facto sovereignty over Guantanamo Bay and the tradition and function of habeas corpus as a judicial check on executive detention. This Court's decision did not determine the reach of the Suspension Clause in areas over which the United States does not maintain de facto sovereignty. See *Al*

Maqaleh v. *Gates*, 605 F.3d 84, 96-97 (D.C. Cir. 2010) (holding the Suspension Clause inapplicable inside Bagram Air Force Base in Afghanistan). It also did not define the extraterritorial application of other constitutional provisions—much less overrule *Verdugo-Urquidez*'s specific holding on the extraterritorial reach of the Fourth Amendment.

Verdugo-Urquidez's analysis and holding are, moreover, entirely consistent with *Boumediene*'s approach to the question of extraterritoriality presented in that case. Like *Boumediene*, see 553 U.S. at 739-752, it relied on the history and function of the relevant constitutional provision, see 494 U.S. at 266-268. And like *Boumediene*, see 553 U.S. at 769-770, it carefully considered the practical consequences of extraterritoriality, 494 U.S. at 273-275; see *id.* at 278 (Kennedy, J. concurring). Petitioners' assertion (Br. 18-19) that *Verdugo-Urquidez* reflected "formalism" or relied solely on the Fourth Amendment's textual reference to "the people" ignores these "other persuasive justifications stated by the Court." *Id.* at 278 (Kennedy, J., concurring).

Boumediene thus casts no doubt on the conclusion that, in accordance with *Verdugo-Urquidez*, the Fourth Amendment has no application in this case. Unlike Guantanamo Bay, Northern Mexico, including the area near the border where Hernández was shot, is not under the sovereignty of the United States, de facto or otherwise. That area is sovereign Mexican territory that U.S. personnel generally may not even enter absent permission from the Mexican government. *Boumediene* involved a site where "no law other than the laws of the United States" applied, and where under the Guantanamo Bay lease agreement

Cuba "effectively ha[d] no rights as a sovereign." 553 U.S at 751, 753. Here, in contrast, the United States is answerable to Mexico for any cross-border uses of force. Cf. *id.* at 770 (explaining that the United States was "answerable to no other sovereign for its acts [at Guantanamo Bay]" and contrasting that situation with the military base at issue in *Johnson* v. *Eisenstrager*, 339 U.S. 763 (1950), where the United States was "answerable" to its allies). And whereas the writ of habeas corpus was intended to serve as a post hoc judicial check on executive detentions, the Fourth Amendment is a substantive individual right that was codified to restrain the conduct of domestic law enforcement, that was not understood by the Framers to apply to aliens abroad, and that could significantly interfere with vital American military and intelligence activities if given such extraterritorial application.

C. This Court Should Reject Petitioners' Ad Hoc Approach To The Extraterritorial Application Of The Fourth Amendment

1. Although petitioners purport (Br. 20) to advocate a test for Fourth Amendment extraterritoriality derived from *Boumediene*'s three-factor test for the Suspension Clause, they actually propose an open-ended judicial inquiry into the wisdom of applying the Fourth Amendment based on the totality of the circumstances presented in each case. On petitioners' view, the application of the Fourth Amendment to aliens abroad depends on the intrusiveness of the search or seizure at issue, including whether it resulted in a loss of life (Br. 20); the particular characteristics of the alien—here, that Hernández was "an unarmed civilian teenager" (Br. 21); whether the injury occurred in an area that is part of a "shared border

community" that is "heavily patrolled" (Br. 21-23); whether the U.S. officer was in the United States and subject to compulsory process in foreign courts (Br. 21); the alien's distance from the U.S. border (Br. 21); whether the alien was in an area in which U.S. officers have previously used force (Br. 23); and whether the officer's alleged conduct is inconsistent with U.S. statutes and regulations (Br. 24-25).

Petitioners' open-ended list of factors appears to have been tailor-made to fit the particular circumstances of this case. It has no basis in *Boumediene* or the decisions on which *Boumediene* relied. Although those decisions considered "objective factors and practical concerns," *Boumediene*, 553 U.S. at 764, they did so to reach categorical conclusions about extraterritoriality like the one adopted in *Verdugo-Urquidez*—not to impose open-ended, case-by-case tests like the one petitioners urge here. In *Boumediene*, for example, the Court held that the Suspension Clause "has full effect at Guantanamo Bay"—it did not parse the individual circumstances of particular detainees. *Id.* at 771. Similarly, the Insular Cases adopted categorical rules about the applicability of constitutional provisions in particular territories. See, *e.g.*, *Rasmussen* v. *United States*, 197 U.S. 516 (1905) (holding that the Sixth Amendment applied in Alaska); *Dorr* v. *United States*, 195 U.S. 138 (1904) (holding that the Sixth Amendment did not apply in the Philippines). Petitioners do not cite any decision adopting the sort of ad hoc approach they advocate—much less one imposing such a test to extend constitutional protections to an ill-defined and uncertain class of aliens outside the de jure and de facto sovereignty of the United States.

2. Petitioners' indeterminate approach would, moreover, "plunge [the political branches] into a sea of uncertainty" about the application of the Fourth Amendment to military and intelligence activities abroad. *Verdugo-Urquidez*, 494 U.S. at 274. Such uncertainty would itself be "impracticable and anomalous," *id.* at 278 (Kennedy, J., concurring)—particularly in the Fourth Amendment context, where this Court has repeatedly expressed its "general preference to provide clear guidance to law enforcement through categorical rules." *Riley* v. *California*, 134 S. Ct. 2473, 2491 (2014); see, *e.g.*, *Virginia* v. *Moore*, 553 U.S. 164, 175 (2008).

The need for clarity especially acute abroad, where restrictions on searches and seizures have potential implications not only for law enforcement, but also for military and intelligence activities. As *Verdugo-Urquidez* observed—and as the Nation's experience in the intervening decades has only reinforced—"the protection of American citizens or national security" sometimes requires the use of armed force abroad. 494 U.S. at 273. Similarly, the United States routinely collects intelligence abroad to gather information that is "essential to the national security of the United States." Exec. Order No. 12,333, preamble, 3 C.F.R. 210 (1981 comp.), reprinted as amended in 50 U.S.C. 3001 note (Supp. II 2015).

Both Congress and the Executive Branch have relied on *Verdugo-Urquidez*'s holding that the Fourth Amendment generally does not protect aliens abroad. The Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.*, Executive Order 12,333, and other laws and regulations governing intelligence activities are structured around that understanding.

See, *e.g.*, *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1143-1145 (2013) (discussing FISA provisions governing "foreign intelligence surveillance targeting the communications of non-U.S. persons located abroad"); see also, *e.g.*, 50 U.S.C. 3039(a). The government also conducts other classified intelligence-gathering activities abroad. *Clapper*, 133 S. Ct. at 1149. Petitioners' proposed test would cast a cloud of uncertainty over those vital activities.

To be sure, the government would have arguments that such military and intelligence activities should not be subject to Fourth Amendment scrutiny even under petitioners' amorphous approach. And the government would have strong arguments that such activities would in any event satisfy any Fourth Amendment reasonableness standard that might apply. But as this Court explained, uncertainty about the Fourth Amendment's extraterritorial reach—and the prospect of case-by-case judicial adjudications—could itself "significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Verdugo-Urquidez*, 494 U.S. at 273-274.

3. Petitioners seek to avoid the disruptive implications of their position by asserting (Br. 25) that this case involves only the immediate border area, not "extraterritoriality of the Fourth Amendment more broadly." But even if petitioners' test were so cabined, it would still be unworkable. Under their view (Br. 21-23), courts would have to decide, among other things, whether it would make a difference if (1) the alien is wounded, rather than killed; (2) the alien is an armed adult, rather than an unarmed minor; (3) the alien is searched, rather than seized; (4) the injury occurred

in an isolated area of the border, not a cross-border community; (5) the injury occurred in an area that is not frequently patrolled, rather than one that is; (6) the U.S. official or the alien was a considerable distance from the border, rather than a few feet from it; or (7) the U.S. official was on the Mexican side of the border, working with Mexican authorities. Because petitioners' test is free-floating, rather than grounded in the history or function of the Fourth Amendment, it offers courts no basis for determining whether any of those differences matter.

That uncertainty could raise questions about the government's vital efforts to secure the Nation's borders. For example, the U.S. Border Patrol relies on "sophisticated systems of surveillance," including "'thermal imaging systems,'" and those systems "do not look strictly inward." Pet. App. 79 (citation omitted). Petitioners' test would also raise questions about any joint U.S.–Mexican law-enforcement activities on the Mexican side of the border zone—including one of the searches at issue in *Verdugo-Urquidez* itself, which occurred in the border city of Mexicali, see 494 U.S. at 262. As Judge DeMoss observed, petitioners' approach to extraterritoriality around the border "devolves into a line drawing game" without principled lines—and that game "is entirely unnecessary because there is a border between the United States and Mexico." Pet. App. 107-108.

Another fundamental problem with petitioners' approach is that it is not actually limited to the border area. Petitioners carefully avoid conceding that the Fourth Amendment is inapplicable outside some ill-defined border zone, and they offer no principled basis for drawing such a distinction. To the contrary, the

test they urge this Court to adopt calls for an ad hoc totality-of-the-circumstances inquiry for *all* questions about the application of the Fourth Amendment to aliens abroad. And many of the factors they identify could have broader application.

For example, petitioners assert (Br. 21) that that it is significant that this case involves the loss of life. But situations that "require an American response with armed force"—and thus risk the loss of life—"may arise half-way around the globe." *Verdugo-Urquidez*, 494 U.S. at 275. Petitioners also contend (Br. 21-22) that it is important to the result here that the United States exercises a degree of control across the border because U.S. Border Patrol agents have the ability to use force against individuals in Mexico. But the same could be said about areas near hundreds of military bases and other U.S. installations abroad; about any area patrolled by the U.S. military; or about any location within the reach of U.S. military weapons.

Petitioners also emphasize (Br. 21) that Agent Mesa was in the United States when he fired his weapon. But U.S. military personnel can trigger the use of deadly force abroad from within the United States. An even broader set of searches and seizures abroad are traceable to decisions made within our borders. *Verdugo-Urquidez*, for example, involved searches that occurred in Mexico, but were planned in a DEA office in California. 494 U.S. at 262. Indeed, as this Court observed in a related context, virtually any claim of injury allegedly caused by a U.S. officer in a foreign country can be "repackaged" as a claim based on actions in the United States. *Sosa*, 542 U.S. at 702-703.

Petitioners thus ask this Court to adopt an ill-defined and uncertain test for the extraterritorial reach of the Fourth Amendment. In *Verdugo-Urquidez*, this Court declined to adopt a rule that could have "significantly disrupt[ed] the ability of the political branches to respond to foreign situations involving our national interest" even though the particular facts of that case involved DEA-led searches of two houses in Mexico. 494 U.S. at 273-374. The Court's concerns remain equally weighty today, and they counsel decisively against petitioners' proposed departure from *Verdugo-Urquidez*'s holding.

III. AGENT MESA IS ENTITLED TO QUALIFIED IMMUNITY ON PETITIONERS' FIFTH AMENDMENT CLAIM BECAUSE HIS ALLEGED ACTIONS DID NOT VIOLATE ANY CLEARLY ESTABLISHED FIFTH AMENDMENT RIGHT

All 15 members of the en banc court of appeals agreed that Agent Mesa was entitled to qualified immunity on petitioners' substantive-due-process claim because his alleged actions did not violate any clearly established Fifth Amendment right. Pet. App. 5-6. That unanimous holding was correct.

A. Petitioners' Claim Is Barred By Qualified Immunity Unless Every Reasonable Officer In Agent Mesa's Position Would Have Known That His Alleged Actions Violated The Fifth Amendment

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established * * * constitutional rights of which a reasonable person would have known.'" *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818

1982)). The doctrine is designed to ensure "that fear of liability will not 'unduly inhibit officials in the discharge of their duties,'" *Camreta* v. *Greene*, 563 U.S. 692, 705 (2011) (citation omitted), and that capable individuals are not deterred from public service or distracted from the performance of their responsibilities, *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985). Qualified immunity promotes those objectives by affording "both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation.'" *Iqbal*, 556 U.S. at 672 (citation omitted).

To survive a motion to dismiss based on qualified immunity, a *Bivens* plaintiff must "plead[] facts showing (1) that the official violated a * * * constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Wood*, 134 S. Ct. at 2066-2067 (citation omitted). "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix*, 136 S. Ct. at 308 (citation omitted)). That standard requires either "controlling authority" or "a robust 'consensus of cases of persuasive authority'" establishing that the official's conduct was unconstitutional. *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 742 (2011) (citation omitted). The authority need not be "directly on point," but it must be sufficiently similar to place the constitutional question "beyond debate." *Id.* at 741.

As these decisions make clear, the qualified-immunity inquiry is not about the reasonableness or wrongfulness of an official's conduct in the abstract. Instead, qualified immunity applies unless the defendant's actions clearly violated the specific right that

provides the basis for the plaintiff's claim. A right is clearly established for qualified-immunity purposes only if "every reasonable official would have understood that what he is doing violates *that right*." *Mullenix*, 136 S. Ct. at 308 (citation omitted; emphasis added). Accordingly, the "clearly established right" violated by the officer's conduct must "be the federal right on which the claim for relief is based." *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994). Here, petitioners allege that Agent Mesa violated an asserted substantive-due-process right to be free from excessive force. Pet. App. 151. The dispositive question is thus whether "every reasonable official" in Agent Mesa's position "would have understood that what he is doing violates [the Fifth Amendment]." *Mullenix*, 136 S. Ct. at 308 (citation omitted).[18]

B. It Would Not Have Been Clear To Every Reasonable Officer In Agent Mesa's Position That His Alleged Actions Violated The Fifth Amendment

The en banc court of appeals unanimously held that, at the time of the incident at issue here, it was not clearly established that the Fifth Amendment applied to an alleged use of excessive force by a U.S. official against an alien located in Mexico. Pet. App. 5-

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[18] The court of appeals relied on the clearly-established prong of the qualified-immunity inquiry only in rejecting petitioners' Fifth Amendment claim; it rejected their Fourth Amendment claim on the merits. Pet. App. 3-7. But even if this Court were to hold that the Fourth Amendment applied here, Agent Mesa would be entitled to qualified immunity on petitioners' Fourth Amendment claim because *Verdugo-Urquidez* precludes any plausible contention that every reasonable official in Agent Mesa's position would have known that his alleged action violated the Fourth Amendment.

6. Petitioners do not disagree with that characterization of the law, and could not plausibly do so in light of this Court's past recognition that "[i]t is well established that certain constitutional protections," including the Fifth Amendment, "are unavailable to aliens outside of our geographic borders." *Zadvydas*, 533 U.S. at 693. Instead, petitioners maintain (Br. 28-33) that the court of appeals should have conducted the qualified-immunity analysis as if Hernández were a U.S. citizen because Agent Mesa did not know with certainty that Hernández was an alien at the time of the incident. Petitioners are correct that the qualified-immunity analysis focuses on facts known to the defendant at the time of the challenged conduct. But that means that the question in this case is whether every reasonable officer in Agent Mesa's position would have known that the Fifth Amendment applies to the use of force against an individual of unknown nationality located outside the United States, where the officer has no reason to believe that the individual is a U.S. citizen. And for two independent reasons, the answer to that question is no.

1. Petitioners are correct (Br. 28-31) that qualified-immunity focuses on facts known to the officer at the time of the challenged conduct. This Court has explained that the "dispositive inquiry" is "whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*," *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added), and the Court has therefore focused on the facts that the officer "reasonably understood" when he acted, *Mullenix*, 136 S. Ct. at 312; see *White* v. *Pauly*, No. 16-67 (Jan. 9, 2017), slip op. 3 ("Because this case concerns the defense of qualified immunity * * * the

Court considers only the facts that were knowable to the defendant officers."). That approach follows from the goal of ensuring that officials are held liable in damages only if they violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix*, 136 S. Ct. at 308 (quoting *Harlow*, 457 U.S. at 818). That standard is not satisfied if the application of a right was not clear based on the facts known to the officer.

2. Petitioners assert that the court of appeals departed from the proper approach to qualified immunity by relying on Hernández's status as an alien, a fact that petitioners contend was unknown to Agent Mesa at the time of the incident.[19] As the government explained in its brief in opposition (at 15), the court did not expressly address the after-acquired facts issue on which petitioners now focus. Had it done so, it might have framed the qualified-immunity question more precisely, to account for Agent Mesa's asserted lack of certainty about Hernández's nationality. But that framing would not have altered the court's ultimate conclusion, because no precedent clearly establishes how the Fifth Amendment applies where, as here, an officer confronts a person of unknown nationality outside the United States who the officer has no reason to believe is a U.S. citizen.

Petitioners observe that, as a general matter, it is clearly established that a law enforcement officer

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[19] Petitioners also briefly assert (Br. 31) that Agent Mesa did not know that Hernández was in Mexico. But that assertion contradicts petitioners' complaint, which alleges that Hernández was "standing * * * on his native soil of Mexico" at the time of the incident and that Agent Mesa "pointed his weapon across the border" before firing. Pet. App. 146-147.

"may not seize an unarmed, nondangerous suspect by shooting him dead." Pet. Br. 34 (quoting *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985). But the decisions petitioners cite to support that proposition involved individuals in the United States. See *Garner*, 471 U.S. at 3-4; *Torres* v. *City of Madera*, 648 F.3d 1119, 1121 (9th Cir. 2011), cert. denied, 132 S. Ct. 1032 (2012); *K.H.* v. *Morgan*, 914 F.2d 846, 848 (7th Cir. 1990). The "situation [Agent Mesa] confronted," *Saucier*, 533 U.S. at 202, was different. Petitioners' complaint alleges that Hernández was in Mexico at the time of the incident, and petitioners do not allege any facts suggesting that Agent Mesa had any reason to believe that Hernández was a U.S. citizen. Pet. App. 146-147. To the contrary, the complaint indicates that Agent Mesa believed (correctly) that Hernández was *not* a U.S. citizen because it alleges that Agent Mesa was "attempting to apprehend him * * * on suspicion of illegal entry into the United States." *Id.* at 151.

Petitioners cite no decision addressing the application of the Fifth Amendment to an officer's use of force against a person who is outside our Nation's territory and who the officer has no reason to believe is a U.S. citizen.[20] Petitioners instead contend (Br. 36) that Agent Mesa is not entitled to qualified immunity because petitioners allege that he engaged in conduct

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[20] Indeed, this Court has not addressed the application of the Fifth Amendment to U.S. citizens in such circumstances. And in other contexts, it has indicated that even citizens abroad lack constitutional rights under some circumstances. See *Boumediene*, 553 U.S. at 760-761 (discussing *In re Ross*, 140 U.S. 453 (1891)); see also *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring); *Reid* v. *Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result).

that, if proved, would violate U.S. Border Patrol regulations governing the use of force, federal and state murder statutes, and international law. But those other sources of law have no bearing on the qualified-immunity inquiry. "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision," even if the relevant statute or regulation "advance[s] important interests or was designed to protect constitutional rights." *Davis* v. *Scherer*, 468 U.S. 183, 194-195 (1984); see *Elder*, 510 U.S. at 515. Instead, the question is whether the contours of the specific constitutional right on which petitioners rely—the Fifth Amendment—were "sufficiently clear that every reasonable official" in Agent Mesa's situation "would have understood that what he is doing violates *that right*." *Mullenix*, 136 S. Ct. at 308 (citation omitted; emphasis added). And because petitioners identify no authority addressing the application of the Fifth Amendment to the novel circumstances presented here, the answer to that question is no.

3. Agent Mesa is also entitled to qualified immunity for an independent reason unrelated to Hernández's citizenship or to any issue about after-acquired facts: It is not clearly established that an excessive-force claim like this one can ever be asserted under the Fifth Amendment, or whether such claims must arise, if at all, only under the Fourth Amendment. See U.S. Br. in Opp. 16-17.

"Because the Fourth Amendment provides an explicit textual source of constitutional protection" against seizures, this Court has held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, in-

vestigatory stop, or other 'seizure' of a free citizen," as distinct from a person in custody, "should be analyzed under the Fourth Amendment * * * rather than under a 'substantive due process' approach." *Graham* v. *Connor*, 490 U.S. 386, 395 (1989). That principle precludes reliance on the Fifth Amendment "if [a plaintiff's] claim is 'covered by' the Fourth Amendment." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 843 (1998).

Here, petitioners' claim is "covered by" the Fourth Amendment in the sense that it involves a "seizure[]." *Lewis*, 523 U.S. at 843. Petitioners allege that Agent Mesa shot Hernández "while attempting to apprehend him," Pet. App. 151, and "there can be no question that apprehension by the use of deadly force is a seizure," *Garner*, 471 U.S. at 7. Accordingly, the district court and four members of the court of appeals concluded that petitioners' Fifth Amendment claim fails on the merits because "if [petitioners] have any claim at all, it arises from the Fourth, not the Fifth Amendment." Pet. App. 11 (Jones, J., concurring); see *id.* at 117-118.

Judge Prado disagreed, concluding that because the Fourth Amendment does not apply extraterritorially, it does not "cover" the excessive-force claim at issue here and thus does not preclude resort to substantive due process. Pet. App. 33-36. But Judge Prado did not suggest that the applicability of the Fifth Amendment to facts like these was clearly established. To the contrary, it appears that no appellate decision has addressed that question. The disagreement among the members of the court of appeals on that question of first impression reinforces the absence of clearly established law. "If judges disagree

on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999); accord *al-Kidd*, 563 U.S. at 743. And the fact that the threshold applicability of the Fifth Amendment was not clearly established provides an independently sufficient basis for holding that Agent Mesa is entitled to qualified immunity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON THE MERITS FOR RESPONDENT

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STATEMENT

Petitioners allege that on June 7, 2010, their fifteen-year-old son, Sergio Adrián Hernández Guereca ("Hernández"), a citizen and resident of Mexico, was playing with his friends at the border area near the Paso del Norte Bridge in El Paso, Texas. *Hernández, v. United States*, 785 F.3d 117 (5th Cir. 2015). According to Petitioners' pleadings, the boys were playing a game which involved running up and touching the border fence and then running back down the incline of the culvert into Mexico. *Id.* United States Customs and Border Patrol (CBP) Agent Jesus Mesa, Jr., arrived at the scene and detained one of the individuals.[1] *Id.* Hernández retreated under the Paso del Norte Bridge in Mexico. *Id.* There is no dispute that Agent Mesa, while standing in the United States, then pointed his service weapon at Hernández and shot across the border, striking Hernández twice. *Id.* Hernández subsequently died. *Id.*

After the shooting, the Justice Department conducted a comprehensive and thorough investigation into the shooting, concluding that the shooting took place while alien smugglers, including Hernández, unsuccessfully attempted an illegal border crossing, and

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[1] The undocumented immigrants detained by Agent Mesa in this case were Augustin Alcaraz, cause number EP-10-M-03410(1)ML and Oscar Ivan Piñeda Ayala, cause number EP-10-M-03403(1)ML. Both cases were prosecuted in the United States District Court for the Western District of Texas, El Paso Division. Defendant Alcaraz was the undocumented immigrant apprehended and ultimately taken into custody by Agent Mesa when Hernández was shot.

began to hurl rocks from close range at Agent Mesa while he was attempting to detain a suspect.[2] U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, Federal officials close investigation into the death of Sergio Hernández-Guereca (2012), *available at* https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca. Agents from the FBI, the Department of Homeland Security, the Office of the Inspector General (DHS-OIG), prosecutors from the Justice Department's Civil Rights Division, and the United States Attorney's Office, interviewed more than twenty-five law enforcement and civilian witnesses; collected, analyzed and reviewed evidence from the scene of the shooting, civilian and surveillance video, law enforcement radio traffic, 911 recordings, volumes of Custom and Border Patrol agent training and use-of-force materials, Agent Mesa's training, disciplinary records, and personal history; conducted site visits; and analyzed and consulted with the International Boundary and Water Commission concerning jurisdictional issues. *Id.*

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[2] It is not uncommon for human traffickers to use rock throwing to hamper law enforcement efforts to apprehend alien smugglers in the border regions. In the San Diego sector of the United States/Mexico border alone, United States Customs and Border Patrol recorded more than 400 assaults, including rock throwing, on agents since 2010. The numbers fluctuate in recent years, from 130 assaults in 2010, 77 in 2011, 133 in 2012, to 73 in 2013, per the agency's statistics. Michael Martinez & Jaqueline Hurtado, *Border Patrol agent shoots, kills migrant who threw rocks*, CNN, Feb. 19, 2014, www.cnn.com/2014/02/19/us/california-border-rock-throwing-death.

Afterwards, a team of experienced prosecutors examined the shooting as a possible violation of United States civil rights laws and as a possible violation of federal homicide statutes. *Id.* Regarding the federal homicide statutes, the team of prosecutors and agents concluded that there is insufficient evidence to pursue prosecution of Agent Mesa for a federal homicide offense. *Id.* The review considered evidence indicating that the agent's actions constituted a reasonable use of force or would constitute an act of self-defense in response to the threat created by a group of smugglers hurling rocks at the agent and his detainee. *Id.* The investigation also revealed that, on these facts, the agent did not act inconsistently with Customs and Border Patrol policy or training regarding use of force. *Id.* Based on a careful review and analysis of all the evidence, the investigative team concluded that evidence would not be sufficient to prove beyond a reasonable doubt that Agent Mesa violated the federal homicide laws in the shooting of Hernández, and found that Agent Mesa's use of force was a result of Hernández and the other individuals surrounding him and throwing rocks at him while refusing his verbal commands to stop. *Id.*

Interestingly, per United States Department of Justice records, Hernández had been arrested twice before for alien smuggling and had been given voluntary returns to Mexico due to his juvenile status.

SUMMARY OF ARGUMENT

IA. The Petitioners' claim for Fourth Amendment protection was answered in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); and the functionality test put forth in *Boumediene v. Bush*, 553 U.S. 723 (2008) does not apply in cases where the United States clearly exercises no power, control, or authority over the area/territory where the incident complained of occurs.

B. Contrary to the Petitioner's assertion that the geographic area where Hernández was standing when he was shot is *de facto* United States soil because CBP routinely patrols that area and the area is in close proximity to the United States/Mexican border, the international border between the United States and Mexico politically fixed and cannot be enlarged to satisfy temporal expedience. To hold otherwise would create extraterritorial jurisdictional jurisprudence based on subjective determinations on where to draw the line.

C. Thirdly, to hold in favor of the Petitioners would create a Fourth Amendment jurisprudence that would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990).

II. Petitioners seek to raise the question as to whether qualified immunity can be granted or denied based on an agent's after-the-fact discovery of a person's legal status. Brief for Petitioners at 13, Hernández

v. Mesa, 136 S.Ct. 567, 193 L.Ed.2d 424, 84 USLW 3299 (2015) (No. 15-118). Specifically, the Petitioners argue that since Agent Mesa could not have known Hernández' citizenship status at the time of the shooting, Agent Mesa could not know have known he was an alien and thus unprotected by the Fourth Amendment protections identified by the lower court. *Id.* However, the Fifth Circuit's decision that agent Mesa is entitled to qualified immunity is correct; and the decision, based on Hernández' status as an alien who had no significant voluntary connection to, and who was not in the United States, could be reasonably inferred by Agent Mesa since he was responding to persons attempting to enter the United States illegally and while Agent Mesa detained one of the individuals attempting to cross into the United States illegally, the remaining persons including Hernández began to throw rocks at him. *Id.*

III. *Bivens* is not applicable where the facts of this case require the Petitioners to satisfy dual prongs to pierce the protection of qualified immunity: "(1) whether the facts that the Petitioners have alleged make out a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the defendant's alleged misconduct." *Ramirez v. Martinez*, 716 F.3d 369, 375 (5th Cir. 2013) (quoting *Brown v. Strain*, 663 F.3d 245, 249) (5th Cir. 2011) (internal quotation marks omitted); *see also Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Pursuant to the second prong, "[a] right is clearly established when 'it would be clear to a reasonable officer that his

conduct was unlawful in the situation he confronted.'" *Ramirez*, 716 F.3d at 375 (quoting *Jones v. Lowndes Cnty.*, 678 F.3d 344, 351 (5th Cir. 2012)). Here, Petitioners fail to prove, at the time that Agent Mesa found himself in the alleged incident, that any Fourth Amendment rights were "clearly established" to protect Hernández.

ARGUMENT

I. The Fourth Amendment's prohibition on the unjustified use of deadly force does not apply in a cross-border shooting of a Mexican civilian on Mexican soil by a United States federal agent.

The Petitioners' claim for Fourth Amendment protection was answered by this Court's previous holding in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); and the functionality test put forth in *Boumediene v. Bush*, 553 U.S. 723, 727 (2008) does not apply in this case where the United States clearly exercises no power or authority over the territory where Hernández was standing when he was shot.

A. *Verdugo* involved the question as to whether the Fourth Amendment applies to a search and seizure by United States agents of property that was owned by a nonresident alien and located in a foreign country. *Verdugo-Urquidez*, 494 U.S. at 261. In fact, after a roll call of the so-called "*Insular Cases*," which extended and curtailed applicable constitutional rights into

United States territories, military bases, etc., the *Verdugo* Court (*citing Dorr v. United States*, 195 U.S. 138 (1904) declared that only "fundamental" constitutional rights are guaranteed to inhabitants of territories held by the United States. *Id.* The *Verdugo* Court held that "if that holding was true with respect to territories ultimately governed by Congress, then the claim that the protections of the Fourth Amendment extend to aliens in foreign nations is even weaker." *Id.* If the respondent in *Verdugo* was denied Fourth Amendment protection because the complained of conduct took place in Mexico, and he had been present in the United States for only a matter of days, which did not convey to him substantial contacts, how then can the Petitioners in this case claim Fourth Amendment protection? *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).

However, the Petitioners assert that in *Boumediene v. Bush*, 553 U.S. 723, 727 (2008), the Court adopted a new approach to deciding jurisdictional matters – "the idea that extraterritoriality questions turn on objective factors and practical concerns, not formalism" – thereby overruling *Verdugo* and its prodigy. However, this view is flawed in that *Boumediene* dealt with the application of the suspension clause to aliens detained by the United States at the Guantánamo Bay Naval station – a station over which the government admitted to exercising full control. *Id.* But *Boumediene* was narrowly focused as it dealt specifically with the application of the Suspension Clause to Guantánamo Bay detainees only. *Id.*

In its plurality opinion, Justice Kennedy wrote "we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Boumediene*, 553 U.S. at 766. In reaching this conclusion, this Court partly relied on its decision in *Rasul*, wherein it wrote that "[a]s we recognized in *Rasul*, the outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in *Eisentrager*." *Boumediene*, 553 U.S. at 766 (2008) (*citing Rasul v. Bush*, 542 U.S. 466 (2004) (Kennedy, J., concurring in judgment). Clearly, the *Boumediene* decision limited the application of the Suspension Clause to areas controlled by the United States, and did not intend to apply all Constitutional protections abroad.

While the *Boumediene* Court did put forth a three-prong test where extra-territoriality decisions are determined by "objective and practical concerns," this test clearly was meant for situations where there was no question as to whether the government asserts control over the location where a constitutional right is being asserted. The *Boumediene* Court did not explicitly overrule *Verdugo*, or any of the other cases having to deal with Fourth Amendment protections and extra-territoriality determinations. In perhaps the

most telling statement contained within the *Boumediene* decision, Justice Kennedy astutely observed that there existed "inherent and practical difficulties of enforcing all constitutional provisions always and everywhere." *Id.* at 759 (*citing Balzac v. Puerto Rico*, 258 U.S. 298, 312 (1922)). And more specifically, the Court stated that the *Boumediene* decision applies only to the premise that Petitioners before the Court are entitled to seek the writ and that the DTA review procedures were an inadequate substance for habeas corpus. *Id.* at 795. Nowhere in the opinion did the *Boumediene* Court overturn *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (aliens outside the sovereign territory of the United States are not entitled to Fifth Amendment rights), or *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (Fourth Amendment protects only aliens with significant voluntary connections to the United States). To the contrary, considering the Court's repeated references to the Suspension Clause, one can only assume that the Court explicitly confined its holding only to the extraterritorial reach of the Suspension Clause and disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause. *See Ali v. Rumsfeld*, 649 F.3d 762, 771 (D.C. Cir. 2011); *Al Bahlul v. United States*, 767 F.3d 1, 33 (D.C. Cir. 2014) (en banc) (Henderson, J., concurring) ("whether *Boumediene* in fact portends a sea change in the extraterritorial application of the Constitution writ large, we are bound to take the Supreme Court at its word when it limits its holding to the Suspension Clause."); *Igartúa v. United States*, 626 F.3d 592, 600

(1st Cir. 2010) ("[T]he *Boumediene* court was concerned only with the Suspension Clause . . . not with . . . any other constitutional text.").

And, in other courts, there seems to be a lack of desire to expand the holding of *Boumediene*. There are numerous cases wherein the courts have declined to extend constitutional protection extraterritorially. Brief for Amicus Curiae Supporting Petitioners at 9, Dean Erwin Chermerinsky, *Hernández v. Mesa*, 136 S.Ct. 567, 193 L.Ed.2d 424, 84 USLW 3299 (2015) (No. 15-118). Specifically, the rejection by the majority opinion in *Doe v. United States* holding that "nothing in *Boumediene* suggests that the Court intended its holding to broadly apply the Bill of Rights or to the takings clause, in particular." *Id.*, (*citing Doe v. United States*, 95 Fed. Cl. 546, 570 (Fed. Cl. 2010)).

The Petitioners also rely heavily on Justice Kennedy's concurring opinion in *Verdugo* to support the application a functional approach to extraterritorial jurisdiction questions. Brief for Petitioners, p. 15, Hernández v. Mesa, 136 S.Ct. 567, 193 L.Ed.2d 424, 84 USLW 3299 (2015). However, Justice Kennedy's concurring opinion in *Verdugo* clearly states that the *Verdugo* Court did not overrule either *In re Ross*, 140 U.S. 453 (1891), or the so-called *Insular Cases* (*i.e., Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Balzac v. Puerto Rico*, 258 U.S. 298 (1922)). *Verdugo*, 494 U.S. at 277. Justice Kennedy correctly states that "[t]hese authorities, as well as *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936),

stand for the proposition that the Court must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad." *Verdugo*, 494 U.S. at 277. And Justice Kennedy agreed with the *Verdugo* Court's outcome because "[t]he conditions and considerations of the *Verdugo* case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous." *Id.* at 278.

And thus, Justice Kennedy's interpretation of examining constitutional protections while considering the undoubted power of the United States to take actions to assert its legitimate power and authority abroad is in no way contradictory to the holding in *Boumediene*, *supra*. In *Verdugo*, *supra*, the conduct occurred in the Republic of Mexico where the United States had no power or control, and in *Boumediene*, *supra*, conduct occurred in an area clearly under the control of the United States.

B. United States law enforcement does not enjoy free control over territory that extends a few feet past the U.S./Mexico border area on the Mexican side as stated by the Petitioners. In fact, quite the opposite is true. In the past, as well as recently as five months ago, whenever a United States or Mexican law enforcement official entered the other country's jurisdiction, even for law enforcement reasons, the result has been the arrests of the respective transgressing law enforcement officer. For example, in 1992, an El Paso police officer pursued a person suspected of committing a

crime into Mexico while driving his official vehicle over the international bridge. E. Ivey, *El Paso Cop arrested after pursuing suspect into Mexico*, El Paso Times, Oct. 27, 1992. The police officer was arrested by Mexican officials and the officer's official police vehicle was seized for a period by Mexican officials. *Id.*, *see also* E. Ivey, *Mexico returns seized cop car to El Paso*, El Paso Times, Nov. 10, 1992. And this enforcement of the finite border is not one-sided, as the United States recently arrested a Transit Officer from Cuidad Juarez, as she chased a suspect into the United States from Mexico over the international bridge in her official police vehicle. R. Carillo, *Detienen a Agente de Vialidad en Puente Internacional*, El Diário, Aug. 9, 2016. And contrary to the Petitioners' position, as well as some of the amici, the relationship between the United States and Mexico, specifically El Paso, TX, and Cuidad Juarez, Chihuahua, MX, is not one of "happy neighborly feelings," but one that is dependant on "who" is having the better day. According to a 1994 study by the U.S. Commission on Immigration Reform, the relationship between the two cities is much more complex. *See* Bean, Chanove, Cushing, de la Garza, Freeman, Haynes, & Spener, U.S. COMMISSION ON IMMIGRATION REFORM, Illegal Mexican Migration & the United States/Mexico Border: The Effects of Operation Hold the Line on El Paso/Juárez (1994). Per the authors of the report, prior to the implementation of "Operation

Hold the Line,"[3] the large populations and the geographic isolation from other parts of the United States and Mexico, and the cross-border familial relationships between people in both cities resulted in a special relationship between El Paso and Juárez. *Id.* at p. 12. Relatives visited back and forth, and both resident populations regularly crossed the border to shop for items either not found in their home city or to take advantage of lower prices in the other city. *Id.* On Halloween, Mexican children routinely cross into El Paso to "trick or treat" (except in 1993, when INS port of entry inspectors denied entry to those without Border Crossing Cards). *Id.* That relationship ended with the implementation of "Operation Hold the Line." *Id.* The implementation of "Operation Hold the Line" raised concerns in Juárez, spawning anti-American protests

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[3] On September 19, 1993, Silvestre Reyes, the Chief of the El Paso Sector of the Border Patrol of the U.S. Immigration and Naturalization Service [INS], (now CBP) launched Operation Blockade along a twenty-mile stretch of the U.S./Mexico border between El Paso and Juárez. Renamed Operation Hold the Line three weeks later (to avoid the negative connotations associated with the word "blockade"), the initiative represented an effort to cut off illegal migration from Mexico into El Paso (and through El Paso into the United States). As such, it involved a major shift in strategy on the part of the El Paso sector Border Patrol. Previously the Border Patrol had allowed relatively unhindered movements across the river, concentrating on the subsequent interception of crossers who had already entered the city, including those who were trying to move inland at major transportation arteries (roads, railroad lines, and airports). Bean, Chanove, Cushing, de la Garza, Freeman, Haynes, & Spener, U.S. COMMISSION ON IMMIGRATION REFORM, Illegal Mexican Migration & the United States/Mexico Border: The Effects of Operation Hold the Line on El Paso/Juárez, p. 1 (1994).

and a proposed boycott on shopping in El Paso. *Id.* These hard feelings continue today.

And lastly, if the Court were to adopt the Petitioners' assertion that the United States enjoys *de facto* jurisdiction because the area where Hernández was shot was close to the official United States/Mexico border, the Court will have created a jurisdiction that is completely subjective depending on how much the United States wants to control or how much Mexico wishes to acquiesce. In the original panel opinion from the Fifth Circuit, Circuit Judge DeMoss, in his concurrence in part and dissenting in part, wrote that at the panel opinion's heart, the determination that Hernández enjoy constitutional protection, was based on the "dubious assessment that there is an undefined area on the Mexican side of the United States/Mexico border which is analogous to the United States Naval Station at Guantánamo Bay, Cuba." *Hernández v. United States*, 757 F.3d 249, 281 (5th Cir. 2014). Judge DeMoss declared that the majority's analogy was flawed in that the United States' presence at Guantánamo Bay, Cuba, was based on both a lease and a treaty. *Id.* Furthermore, Judge DeMoss stated, "the United States 'has maintained complete and uninterrupted control of [Guantánamo Bay] for over 100 years.'" *Id.* Then he astutely pointed out that the same could not be said of the Mexican side of the border. *Id.* Judge DeMoss rejected the proposition that occasional exercises of "hard power across the border," and practices such as "'preinspection' examination and inspection of passengers," somehow transformed a portion of northern

Mexico into anything resembling the Naval Station at Guantánamo Bay. *Id.* Judge DeMoss asked that "if the fact that the United States exerts, and has exerted, powerful influence over a strip of land along the border of northern Mexico, justifies application of constitutional protection, how wide then is that strip? *Id.* He logically followed the query to its rightful conclusion: is constitutional protection "applicable in all of Ciudad Juarez, or even the entire state of Chihuahua?" *Id.* One could continue this exercise pertaining to the question of "how wide": as far as the eye can see? As far as the bullet travels? Finally, Judge DeMoss stated, "the majority's approach devolves into a line drawing game which is entirely unnecessary because there is a border between the United States and Mexico." *Id.*

C. The Petitioners' position, if adopted by this Court, could have a very significant effect on the United States' ability to conduct and make foreign policy operations and decisions. Andrew Kent,[4] *Thoughts on the Briefing to Date in Hernández v. Mesa – The Cross-border Shooting Case*, LawFare, Dec. 27, 2016, *available at* www.lawfareblog.com/thoughts-briefing-date-hernandez-v-mesa-cross-border-shooting-case. This

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[4] Andrew Kent is Professor of Law at Fordham University School of Law. He teaches and writes about constitutional law, foreign relations law, federal courts and procedure, national security law, public international law and professional responsibility. Professor Kent's academic writing has frequently focused on questions of the Constitution's domain – when, where and for whom are constitutional protections available. He is a faculty advisor to the Center on National Security and the Fordham International Law Journal.

is because the Fourth Amendment governs all manner of searches and seizure by U.S. officials; everything from electronic surveillance to physical searches of persons, buildings, computers and other devices, to thermal imaging to shootings. would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in "searches or seizures." *Id.* And this is exactly what Chief Justice Rehnquist was thinking when he stated in *Verdugo*, "[t]he United States frequently employs Armed Forces outside this country – over 200 times in our history – for the protection of American citizens or national security ... [a]pplication of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Verdugo*, 494 U.S. at 273. He went on to state that if the respondent in *Verdugo* prevailed, aliens with no attachment to the United States "might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters." *Id.* For example, extraterritorial foreign intelligence surveillance and even drone strikes, both of which have proceeded to date under the executive branch's assumption that noncitizens outside the United States have no relevant constitutional rights in those contexts would be affected should someone feel that their Fourth Amendment right was violated. Andrew Kent, *supra*. The *Verdugo* Court cautioned that the Ninth Circuit's rule would plunge government officials "into a sea of uncertainty as to what might be

reasonable in the way of searches and seizures conducted abroad." *Id.* at 274.

II. Agent Mesa is entitled to qualified immunity.

The Petitioners seek to raise the question as to whether qualified immunity can be granted or denied based on an agent's after-the-fact discovery of a person's legal status. Specifically, the Petitioners argue that since Agent Mesa could not have known Hernández' citizenship status at the time of the shooting, Agent Mesa could not have known he was an alien and thus unprotected by the Fourth Amendment protections. The Petitioners' reliance on a lower court decision, *Moreno v. Baca*, 431 F.3d 633 (9th Cir. 2005), is misplaced. In *Moreno*, law enforcement seized two men walking down the street, a seizure law enforcement officials later justified because Moreno was a parole violator. *Id.* The state contended that Moreno had no Fourth Amendment rights that could have been violated by virtue of the parole condition allowing warrantless searches of his person, residence, and property; and second, the appellants contend that the arrest and search were justified by the parole search condition and the outstanding arrest warrant, despite the fact that the officers did not know of either fact at the time. *Id.* at 638. The Ninth Circuit however, did not agree with the idea that police officers cannot retroactively justify a suspicionless search and arrest based on an after-the-fact discovery of an arrest warrant or a

parole condition – i.e., the victim of the violations status. *Id.* at 641.

However, the facts in *Moreno* are significantly different than the facts in this case. In *Moreno*, the two individuals, Richard Moreno, and his companion Joe Rodriguez, are driving to a meeting at St. Lucy's Church in the City Terrace area of Los Angeles. *Id.* at 636. After their car broke down, Moreno and Rodriguez proceeded toward the meeting on foot. *Id.* At approximately 7 p.m., a marked Los Angeles County Sheriff patrol car passed them as they walked down the street, made a U-turn, and pulled the car onto the curb in their path. *Id.* Two deputies got out of the car. *Id.* Deputy Banks, who was riding in the passenger seat, ordered Moreno and Rodriguez to approach. *Id.* It is undisputed that the deputies learned that Moreno was on parole and that he had an outstanding arrest warrant only after searching and detaining him. *Id.* at 637. Moreno was subsequently charged in state court with possession of a controlled substance. *Id.* Deputies Banks and Garcia testified against him at trial and Rodriguez testified for the defense. *Id.* Moreno was acquitted by a jury in 2002. Moreno then brought this action under 42 U.S.C. § 1983, contending that Banks and Garcia violated his Fourth Amendment right to be free from unreasonable searches and seizures when they arrested and searched him without cause. *Id.*

In the case at hand, Agent Mesa was responding to persons trying to enter the United States by going through the border fence at the international border

between Mexico and the United States. Agent Mesa detained one of the individuals whereas the remaining persons including Hernández began to throw rocks at him.

The circumstances regarding the two cases could not be more opposed. In one instance, you have two men driving, and then subsequently walking down the street who were approached by police officers for no apparent reason. In the other, you have persons attacking a law enforcement officer with rocks, the choice of weapon for alien smugglers, after running up to the border fence, on an international border.

First, when determining whether qualified immunity exists, the court must look to see if (a) the officer's conduct violated a constitutional right and if so, (b) whether that right was clearly established at the time the alleged violation occurred. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The contours of the right must be clear enough that a reasonable officer would have understood that what he or she was doing violated that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

"[A]lmost without exception in evaluating alleged violations of the Fourth Amendment, the Court has to first undertake an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Scott v. United States*, 436 U.S. 128, 137 (1978); *see also Ornelas v. United States*, 517 U.S. 690, 696 (1996) ("We have described reasonable suspicion simply as 'a particularized and objective basis' for suspecting the person stopped of criminal activity, and

probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."); *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (holding that "factual determinations bearing upon search and seizure" must be judged against an "objective standard" based on "facts available to the officer at the moment"). When looking at the facts available to Agent Mesa at the time of his encounter with Hernández, using the objective standard, it is plain to see that at the time of the shooting it could be reasonably assumed by Agent Mesa that Hernández was breaking the law, by engaging in alien smuggling, and assaulting the agent with rocks.

Also, the Petitioners' argument that Hernández' status must be known to Agent Mesa prior to the encounter for qualified immunity protection to be afforded is also flawed. Hernández' citizenship status is irrelevant for purposes of qualified immunity protection in this case. Both *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), preclude aliens from Fourth and Fifth Amendment protections unless the aliens have significant voluntary connections to the United States or are actually within the sovereign territory of the United States. Given the rock throwing and suspected alien smuggling activities of Hernández at the time of his interaction with Agent Mesa, Hernández is in a circumstance totally different from what Moreno experienced.

III. *Bivens* is not applicable to the facts of this case.

The Petitioners' claim cannot be asserted under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which requires a party to satisfy dual prongs to pierce the protection of qualified immunity: "(1) whether the facts that the plaintiff has alleged make out a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the defendant's alleged misconduct." *Ramirez v. Martinez*, *supra*, (quoting *Brown*, *supra*; *see also Pearson v. Callahan*, *supra*. Pursuant to the second prong, "[a] right is clearly established when 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Ramirez*, 716 F.3d at 375 (quoting *Jones v. Lowndes Cnty.*, 678 F.3d 344, 351 (5th Cir. 2012)).

Here, Petitioners have failed to prove, at the time that Mesa found himself in the alleged incident, that any Fourth Amendment rights were "clearly established" to protect Hernández. First, the procedural history below of the instant case exhibits that neither right was clearly established. Three Fifth Circuit Justices determined that "the Fourth Amendment does not apply," but that the Fifth Amendment does apply in this case and that it was clearly established. *Hernández v. United States*, 757 F.3d 248, 267, 279-80 (5th Cir. 2014). Then, sitting en banc, the entire Fifth Circuit Court reversed, including the original two panelists who gave Hernández initial protection, determining that neither the Fourth Amendment nor the Fifth

Amendment applies. *Hernández v. United States*, 785 F.3d 117, 117-21 (5th Cir. 2015). That is, fifteen distinguished jurists determined that neither right was clearly established at the time of the facts alleged. *Id.* at 120 ("No case law in 2010, when this episode occurred, reasonably warned Agent Mesa that his conduct violated the Fifth Amendment."). This determination favors the "objective legal reasonableness" of Mesa's action, "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)).

As it specifically pertains to the Fourth Amendment, Mesa agrees with the Fifth Circuit's opinion that, pursuant to *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), "Hernández, a Mexican citizen who had no 'significant voluntary connection' to the United States, and who was on Mexican soil at the time he was shot, cannot assert a claim under the Fourth Amendment." *Hernández*, 785 F.3d at 119 (*citing Verdugo-Urquidez*, 494 U.S. at 271) (internal citation omitted).

As it specifically pertains to the Fifth Amendment, Mesa again agrees with the Fifth Circuit, which declined to read the tea leaves of *Boumediene v. Bush*, 553 U.S. 723 (2008); instead, it relied on the Court's clearly established language, which "expressly limited its holding to the facts before it." *Hernández*, 785 F.3d at 121 (*citing Boumediene*, 553 U.S. at 795 ("Our decision today holds only that Petitioners before us are entitled to seek the writ.")).

Ignoring this express language, Petitioners instead ask the Court to ignore "the general rule of constitutional avoidance," *Pearson v. Callahan*, 555 U.S. 223, 241 (2009) and to fashion *ex post* constitutional protections through *Bivens*. And this Court held that *Bivens* "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances [the Court has] found a *Bivens* remedy unjustified." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *see also United States v. Stanley*, 483 U.S. 669, 683 (1987) ("[I]t is irrelevant . . . whether the laws currently on the books afford Stanley, or any other particular serviceman, an 'adequate' federal remedy for his injuries."). Therefore, the Court should decline Petitioner's invitation to invade the province of the legislature by legislating new constitutional rules.

CONCLUSION

The *en banc* opinion from the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

As a general rule, if a U.S. border guard standing on U.S. soil shoots and kills an unarmed teenager at close range, there is no doubt that the Fourth Amendment's prohibition on unjustified deadly force applies, and that the judiciary may review the constitutionality of the officer's conduct.

The question here is whether everything changes because the victim turned out to have been a Mexican citizen who, seconds before he was shot, had crossed the border into Mexico. That is, are courts still able to review the lawfulness of an officer's conduct in these circumstances? Or will the Executive instead be handed unchecked power to determine the legality of its own use of deadly force against noncitizens at the border?

The government argues for the latter. It asks this Court to hold that the Constitution's prohibition on unjustified deadly force does not apply. And it contends that, either way, there is no avenue for judicial review. In pressing these arguments, the government asserts that national-security interests, immigration activities, and foreign relations would be threatened by constitutional adjudication. Yet the government does not identify any such concerns raised specifically by *this* case.

This Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). That is all the more true here. If this Court were to side with the government, it would effectively turn the border into an on/off switch for fundamental constitutional protection. That would "permit a striking anomaly in our tripartite system," conferring power on "the President, not this Court, [to] say 'what the law is.'" *Boumediene v. Bush*, 553 U.S. 723, 764-65 (2008).

I. The Fourth Amendment's prohibition on the unjustified use of deadly force applies to a close-range, cross-border shooting by a U.S. agent standing on U.S. soil.

As our opening brief explains (at 15), this Court has made clear that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Boumediene*, 553 U.S. at 764. That "century-old approach" asks whether extraterritorial application of a particular constitutional provision, in a particular context, would be "impracticable and anomalous." *Id.* at 759-60. *Boumediene* specifically emphasized that this functional "extraterritoriality test" has been "appl[ied]" even "in the Fourth Amendment context." *Id.* at 760. Concurring in *United States v. Verdugo-Urquidez*, Justice Kennedy applied the test and concluded that practical concerns dictate that "the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." 494 U.S. 259, 278 (1990).

The first question in this case is whether a *different* provision of the Fourth Amendment—its prohibition on unjustified deadly force—applies when a border guard standing on U.S. soil shoots an unarmed Mexican citizen at close range, just across the border.[1] In answering no, the respondents do not dispute this Court's traditional functionalist approach or Justice Kennedy's application of it in *Verdugo-Urquidez*. Nor do they make much effort to show why applying protection here would be impracticable or anomalous. Instead, they offer two

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[1] Although the government asserts (at 13) that "[t]he availability of a *Bivens* remedy is 'antecedent' to" the other two questions, this Court has not provided an order of battle in this context. The question whether the Constitution applies at all is logically prior to the question whether, *if* it applies, there is a remedy.

reasons in support of their formalistic territorial rule. The first is that (in their view) *Verdugo-Urquidez* entirely "forecloses" any unjustified-deadly-force claim. U.S. Br. 11, 33, 37-38; *see* Mesa Br. 4, 6. The second is that, even if *Verdugo-Urquidez* does not control, "objective factors and practical concerns" would cut against constitutional protection here. U.S. Br. 43-48; *see* Mesa Br. 14-16. Neither is persuasive.

A. The government first argues (at 33) that *Verdugo-Urquidez* "forecloses" any possibility that the Fourth Amendment applies here. The government relies almost entirely on the sentence in Justice Kennedy's concurrence stating that he "d[id] not believe" that his views "depart[ed] in fundamental respects from the opinion of the Court, which [he] join[ed]" (thus providing the fifth vote). *Id.* at 275. But, as the government later concedes (at 38), Justice Kennedy expressly disagreed with the plurality's formalistic reliance on the Fourth Amendment's reference to "the people." *Id.* at 276-77. Eschewing formalism, he instead applied the "impracticable and anomalous" test drawn from Justice Harlan's concurring opinion in *Reid v. Covert*, 354 U.S. 1, 75-76 (1957). And the pragmatic concerns he identified were specific to the warrant requirement. *Verdugo-Urquidez*, 474 U.S. at 278 ("The conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous.").

In light of Justice Kennedy's concurrence and the Court's later decision in *Boumediene*, *Verdugo-Urquidez* does not foreclose the possibility that another part of the Fourth Amendment might, in narrow circumstances, apply to noncitizens beyond the border. And although the government disagrees, it does not deny the core point: an expansive reading of *Verdugo-Urquidez*—formalistically extending its holding to a case with radically different facts, involving a different constitutional

provision—is inconsistent with the Court's traditional functionalist approach.

Contrary to the government's assertions, therefore, we are not arguing that "*Boumediene* implicitly overruled *Verdugo-Urquidez*," or that "*Verdugo-Urquidez* is no longer good law." U.S. Br. 11, 39. Our position, rather, is that *Boumediene* correctly articulated the "common thread uniting" this Court's extraterritoriality cases (including *Verdugo-Urquidez*): their shared recognition that functionalism, not formalism, guides the way. Even if some cases could arguably be read to suggest that constitutional protection for noncitizens necessarily stops where "*de jure* sovereignty" ends, the Court in *Boumediene* refused to read its cases "to conflict in this manner." 553 U.S. at 764. It should do the same here. Reading *Verdugo* to sweep in constitutional provisions other than the warrant requirement—without first asking the critical question whether extraterritorial application of those provisions would be impracticable and anomalous—would mark a stark departure from this longstanding approach.

B. Under the correct approach, the inquiry "turn[s] on" what it always has: "objective factors and practical concerns." *Id.* The Court in *Boumediene*, drawing on Justice Kennedy's concurrence in *Verdugo-Urquidez* and Justice Harlan's concurrence in *Reid*, emphasized that a key question is whether extraterritorial application would be "impracticable and anomalous." *Id.* at 759-60.

On this question, the respondents have almost nothing to say. Agent Mesa makes no attempt to explain what is impracticable or anomalous about ensuring that border guards, in carrying out their law-enforcement duties on U.S. soil, adhere to uniform constraints on the use of deadly force. And the government does not pick up the slack: It does not deny that protection would

apply if Sergio were a U.S. citizen, or had been standing on the U.S. side of the border, or had significant connections to the United States. The government does not articulate why it would be impracticable or anomalous for border guards to heed the same constitutional constraints in the circumstances presented here.

Instead, the government takes a different tack. It claims that affording constitutional protection here would "itself be 'impracticable and anomalous" because it would create "uncertainty" about the Fourth Amendment's application "to military and intelligence activities abroad." U.S. Br. 44. Put differently, the government is *not* arguing that applying constitutional protection in a close-range, cross-border shooting would in any way be impracticable or anomalous. Rather, the government is arguing that it would be *in other contexts*, and that this is reason enough to deny protection here.

This is an argument against the Court's functionalist approach itself. Indeed, all three points the government advances for why a functionalist test would yield the same result as a formalist one are riffs on this same point: the government's belief that there is no limiting principle to extraterritorial application of the unjustified-deadly-force prohibition. The government argues that the geographic region (the border zone) is "ill-defined" rather than "categorical." U.S. Br. 42-43. It claims that "uncertainty" surrounding extraterritoriality would "cast a cloud" on "military and intelligence activities" and border security. U.S. Br. 44-46. And it insists that our position "is not actually limited to the border area." U.S. Br. 46-48.

These same arguments are often made in opposing extraterritorial application of a constitutional provision. *See, e.g.*, *Boumediene*, 555 U.S. at 842 (Scalia, J., dissenting) (criticizing "the Court's 'functional" test" as "un-

workable in practice" because it "does not (and never will) provide clear guidance for the future"); *cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality op.) (rejecting government's argument that applying basic due-process protections would be "unworkable and inappropriate in the enemy-combatant setting"). Experience has shown, however, that these administrability concerns have not materialized. *Boumediene* did not purport to resolve a host of difficult questions about its scope. And the Insular Cases did not provide a comprehensive list of which rights are deemed "fundamental" and thus applicable in American territories. *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922). Yet the federal courts have proved up to the task of drawing lines in these (and many other) contexts, and will do so again here. *See, e.g.*, *Tuaua v. United States*, 788 F.3d 300, 307-09 (D.C. Cir. 2015) (holding that birthright citizenship is not "fundamental" under the Insular Cases); *Al Maqaleh v. Gates*, 605 F.3d 84, 94-99 (D.C. Cir. 2010) (holding that Suspension Clause does not apply at Bagram under *Boumediene*'s functionalist approach).

In any event, the government's line-drawing concerns are overstated. Although it raises the specter of a "global," "all-encompassing view of the Fourth Amendment," rejected by this Court in *Verdugo-Urquidez*, 494 U.S. at 268-69, we are not seeking to resurrect that view here. Our theory is far narrower: that the prohibition on unjustified deadly force applies at (and just across) the border, at least when a law-enforcement officer on U.S. soil fires his weapon at close range.

Once that is understood, the government's concerns fall by the wayside. The government speculates, for example (at 45-46), that a ruling for petitioners would imperil intelligence gathering and "searche[s]" of noncitizens beyond the border. Not in the least. *Verdugo-Urquidez* squarely holds that the government may con-

duct warrantless searches and seizures of property of noncitizens abroad because of the practical problems inherent in getting a warrant. *See* 494 U.S. at 278 (Kennedy, J.). That holding applies equally to government surveillance and "thermal imaging systems" in northern Mexico. U.S. Br. 46.

The government also floats the possibility that a ruling in our favor would result in applying constitutional protection to victims of drone strikes and other deadly military operations in far-off corners of the earth. *Id.* at 47. That concern is misplaced. Although the U.S. often exercises hard power near its military bases and installations abroad, the practical concerns with applying constitutional protections to military operations "aris[ing] halfway around the globe," *Verdugo-Urquidez*, 494 U.S. at 275, are worlds apart from those presented here. Domestic law-enforcement officers, including border guards, operate under constitutional constraints on the use of deadly force every day. That is the norm. The opposite is true in the military context. Having judges review combat decisions on the other side of the world (even those implemented from a command center inside the U.S.) is different in kind than ensuring uniform compliance with a fundamental constitutional norm by domestic law enforcement on the border.

Finally, the government challenges the workability of a functional, context-specific approach even as to the immediate border area. *See* U.S. Br. 45-46. These concerns are no barrier to extraterritorial application either. As our opening brief explains (at 26), federal courts have extensive experience crafting and applying rules in Fourth Amendment cases that look to a variety of factors to determine the scope of constitutional protection. *See, e.g.*, *United States v. Dunn*, 480 U.S. 294, 301 (1987) (curtilage doctrine). And the Fourth Amendment's substantive reasonableness standard is flexible enough to

address any unique concerns that may arise in the cross-border context. In other border-related cases, for example, courts look not only to the formal border itself but to its "functional equivalents," and they make judgments about just what that encompasses. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973); *United States v. Martinez-Fuerte*, 428 U.S. 543, 550 (1976).

Courts can do the same here. If domestic law-enforcement officers continue to fire their guns across the border, resulting in the loss of civilian life, then it is difficult to imagine what is so harmful—or more to the point, so impracticable or anomalous—about ensuring that their conduct comports with basic constitutional norms. This does not rule out case-specific reasons for declining to apply protection in certain circumstances. Nor does it mean that there will be a constitutional violation in every case. It simply ensures that courts are able to play their traditional role as a check on unlawful government conduct.

On the respondents' view, however, "the only check on unlawful conduct would be that which the Executive Branch provides"—either through extradition, criminal proceedings, or internal discipline. App. 87a-88a. None of those hypothetical enforcement mechanisms, however, has thus far proved capable of addressing the problem. This Court's cases point to a different approach: "in our tripartite system of government," it is the Judiciary's role to serve as a check on the Executive Branch—not the Executive's prerogative to serve as a check on itself. *Boumediene*, 553 U.S. at 765.

II. Agent Mesa is not entitled to qualified immunity.

On qualified immunity, the government agrees that the answer to the question presented is no: immunity may not be granted or denied based on facts unknown to the officer at the time of the incident. *See* U.S. Br. 51.

Yet that is exactly what the court of appeals did. It relied on facts unknown to Agent Mesa at the time of the shooting (Sergio's nationality, ties to the U.S., and precise physical location) in holding that Mesa is entitled to immunity. *See* App. 5a. Even Mesa agrees (at 20) that Sergio's later-discovered "citizenship status is irrelevant for purposes of qualified immunity protection in this case." For that reason alone, this Court should reverse.

With later-discovered facts off the table, there is no basis for granting qualified immunity here. A border guard who uses unjustified deadly force while in the U.S. violates the Constitution under longstanding, clearly established law. The complaint alleges that Sergio was playing a game with friends in the culvert and had no interest in entering the United States. Pet. App. 146a. It then describes how Mesa shot Sergio after Sergio "retreated" under the bridge, where he stood "defenseless" with "no weapon," not "threatening Mesa, or any third party." Pet. App. 142a, 146-47a. It has been clearly established for decades that "seiz[ing] an unarmed, nondangerous suspect by shooting him dead" is unconstitutional. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Mesa does not argue otherwise.

Instead, he rests his qualified-immunity defense (at 18-20) on an alternative account of the facts that is wholly without support in the record. But defendants may not obtain a dismissal based on facts outside the complaint. *See* Fed. R. Civ. P. 12(b)(6), (d). At the motion-to-dismiss stage, the question is whether the complaint "alleges the commission of acts that violated clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). It does.

For its part, the government—having conceded the answer to the question presented—takes up the fight as to whether Mesa is entitled to immunity based on the specific allegations made here. But the government

cannot carry Mesa's burden for him. Although the government tries to shift the burden onto the petitioners to *disprove* immunity, *see* U.S. Br. 49-50, "qualified immunity is an affirmative defense" that must be pleaded and proved by "the defendant." *Crawford-El v. Britton*, 523 U.S. 574, 587 (1998). As this case comes to the Court, Mesa has utterly failed to carry his burden.

Nor does the government make up for the shortcomings in Mesa's defense anyway. It agrees that *Garner* and other cases clearly establish constitutional prohibition against excessive lethal force "as a general matter," but maintains (at 52-53) that they are distinguishable because they "involved individuals in the United States." The government likewise argues (at 50 n.18) that, given *Verdugo-Urquidez*, Mesa could not have known that shooting Sergio was unlawful. But again: "Because this case concerns the defense of qualified immunity, ... the Court considers only the facts that were *knowable* to the defendant officers," which do not include Sergio's nationality, ties to the U.S., or precise physical location—facts ascertained only after the incident. *White v. Pauly*, 137 S. Ct. 548, 550 (2017) (per curiam) (emphasis added).

The government's proposed analysis, moreover, is generalized even further away from this case. The government contends (at 52) that Mesa is entitled to immunity because he shot "a person of unknown nationality" whom he had "no reason to believe is a U.S. citizen." But no border guard would reasonably believe that he may use lethal force against an unarmed, unthreatening person of *unknown* nationality just because that person might be a noncitizen without substantial ties to the U.S. The government's argument also rests on "far too general a [description] to control" the qualified-immunity

analysis here, and barely resembles what occurred in this case.[2] *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775 (2015). A trained border guard should know that the culvert where the shooting took place is a shared, interconnected area between the U.S. and Mexico, where thousands of people—U.S. and Mexican citizens alike—cross the border daily. *See generally* Br. of Border Scholars. He should also know that children playing in the culvert could be citizens of either country. *Id.* The mere chance that a child is *not* a U.S. citizen does not shield a border guard from liability when he chooses to use unjustified lethal force while standing on U.S. soil.

A contrary rule would mean that border guards would almost always be entitled to immunity because they rarely can know someone's nationality (and U.S. ties) beforehand. Indeed, the upshot of the government's position, which it buries in a footnote (at 53 n.20), is that Mesa would be immune from liability even if Sergio were a *U.S.* citizen. There, too, Sergio would have been "of unknown nationality" at the time of the incident, and Mesa would have had "no reason to believe" he was a U.S. citizen. That cannot be right.

Nor is Mesa entitled to qualified immunity under the government's rewritten question presented—whether Mesa's intentional shooting of an unarmed teenager violated a "clearly established substantive-due-process right under the Fifth Amendment." U.S. Br. (I); BIO (I); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S.

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[2] The government's proposed qualified-immunity standard is also incorrect. *Verdugo-Urquidez* held that the Fourth Amendment also protects persons with "significant voluntary connections" to the United States. 494 U.S. at 271. Agent Mesa did not know Sergio lacked such connections when he shot him.

263, 280 (1993) ("[I]t is the petition for certiorari (not the brief in opposition and later briefs) that determines the questions presented."). The government takes a stray quote from *Mullenix v. Luna*, 136 S. Ct. 305 (2015), to mean that a plaintiff must identify a decision that both clearly establishes the plaintiff's right and locates that right in the precise constitutional provision on which the plaintiff relies. U.S. Br. 50. *Mullenix* did no such thing. "[T]he proper inquiry is whether the *right* itself—rather than its *source*—is clearly established." *Russo v. City of Bridgeport*, 479 F.3d 196, 212 (2d Cir. 2007). And for good reason: If an officer is on notice that his actions are unlawful, no further notice is needed. Additionally, because the Fourth and Fifth Amendments are incorporated against the States under the Fourteenth Amendment, the government's position would mean that a decision holding a *federal* officer liable under the Fourth Amendment would not clearly establish that a *state* officer's identical actions were equally unconstitutional under the Fourteenth Amendment.

In any case, Mesa's actions clearly violated the Fifth Amendment—whose protections have already been interpreted to apply abroad. *See Reid v. Covert*, 354 U.S. 1 (1957). It "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172-73 (1952), to point and shoot at an unarmed child who is retreating and attempting to hide.

III. No special factors militate against recognition of a damages remedy for a border patrol agent's unlawful killing on the border.

That leaves one question: If constitutional protection applies and qualified immunity does not, is the Executive's domestic conduct nevertheless immunized from judicial review? The answer is no.

Justice Harlan explained in *Bivens* that it would be "anomalous to conclude that the federal judiciary" is

"powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will." *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 403-04 (1971) (Harlan, J., concurring in the judgment). Yet the respondents urge precisely this anomalous result.

The respondents recognize that, without *Bivens*, the Hernández family would be left with "nothing" to remedy their son's unlawful killing and little to deter similarly unlawful conduct in the future. *Id.* at 409-10. In the government's view, however, that result is justified because "Congress, not the Judiciary, is the appropriate body to decide whether ... to provide monetary remedies," U.S. Br. 18, and because some other, hypothetical border-related cases *could*, in the future, implicate special factors of national security and international diplomacy—though there is no harm to either interest here. That argument conflates this case with challenges to executive *policies* on immigration, diplomacy, or national security. Here, we seek merely to enforce a constitutional rule that constrains rogue officers and is already part of the Executive's national-security and diplomacy policy: border guards cannot shoot innocent children. Without a *Bivens* action, that right becomes "merely precatory." *Davis v. Passman*, 442 U.S. 228, 242 (1979).

A. The government first attacks *Bivens* itself, characterizing the doctrine as a historical blemish since limited by this Court. U.S. Br. 15. But even as the Court has declined to extend *Bivens*, "it has never—outside of the unique military context—left an aggrieved family with 'nothing.'" Pet. Br. 48. The Court's decision not to recognize *additional* implied causes of actions for constitutional violations where Congress, state tort law, or other remedies suffice does not diminish the important back-

stop that *Bivens* provides in the separation of powers. Pet. Br. 37-38. Where no other remedies exist, a *Bivens* action is the only means to ensure "the vindication of constitutional interests such as those embraced by the Fourth Amendment," as well as the rule of law. *Bivens*, 403 U.S. at 407 (Harlan, J. concurring in the judgment).

Damages claims for constitutional violations, just like claims for injunctive relief, have a longstanding history. As the government recognizes, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers ... reflects a long history of judicial review of illegal executive action, tracing back to England," and is based entirely upon judge-made remedies. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see also Bivens*, 403 U.S. at 404 (Harlan, J., concurring). The government's contention that "[t]here is no comparable authority for judicial creation of damages remedies," U.S. Br. 15 n.6, is belied by two centuries of practice. State and federal courts alike recognized judge-made damages actions against federal officers all the way back to the Founding—including, as in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), for unlawful actions taking place outside the territorial jurisdiction of the United States. *See, e.g., Teal v. Felton*, 53 U.S. (12 How.) 284, 292 (1852) (rejecting argument that federal jurisdiction in damages suits against federal officers is exclusive). Whether the claims in these cases arose under common law, pre-*Erie* general law, or the Constitution, judges fashioned damages remedies in the absence of express statutory authorization. *See, e.g., Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 10, 12 (1817); *see also* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L.J. 77, 87-90, 135-37 (1997).

Given this tradition, the federal government did not even argue in *Bivens* that courts lacked the authority to

recognize damages remedies for constitutional violations; it argued for an exercise of *state* judicial power in lieu of *federal* judicial power. *See* Br. for Resp. at 19-25, 35-38, *Bivens*, 403 U.S. 388 (1971) (No. 70-301), 1970 WL 116900. (Today, the FTCA takes such actions outside of state judicial power.) The government would now cast aside this deeply entrenched tradition of judge-made damages remedies against federal officers, leaving constitutional violations with no remedy at all.

B. Cherry-picking a handful of statutes, the government next purports to divine a pattern that demonstrates Congress's decision to preclude a judicial damages remedy for aliens injured abroad, which supposedly counsels against recognizing a *Bivens* action here. U.S. Br. 22-26. That argument fails at each step.

First, Congress is entitled to far greater latitude in defining the reach of statutory and common-law rights rather than constitutional rights. In the former context, the courts' job is simply to vindicate the meaning conveyed by the legislature—which may have good reasons, bad reasons, or no reasons whatsoever for limiting the geographic scope of particular claims. Thus, for example, the FTCA's "foreign country" exception "codified Congress's 'unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 (2004) (quoting *United States v. Spelar*, 338 U.S. 217, 221 (1949)). Whatever the merits of that concern in the context of common-law tort claims, it has no bearing here—where any liability depends solely on the Constitution, as authoritatively interpreted by this Court. *See* Pet. Br. 43. Similarly, the government's nod to the general presumption against extraterritorial application of statutes is

inapt because that interpretive canon is grounded entirely in considerations not present here. *See* Pet. Br. 47-48.[3]

Second, the government's scattershot examples prove no pattern but its selection bias. The government argues that Congress has not "adopted a [] claims procedure for aliens injured abroad by the actions of U.S. Border Patrol agents" similar to what Congress created in the Foreign Claims Act and the International Agreement Claims Act for overseas actions of the State Department or noncombat activities of the military. U.S. Br. 22-24.[4] True enough, but it does not follow that Congress meant to preclude a damages action against border guards for unconstitutional uses of lethal force.

Looking beyond the government's select examples demonstrates that Congress has signaled an awareness that damages actions are available to foreign nationals injured abroad by federal officers. In section 1004(a) of the Detainee Treatment Act (DTA), Pub. L. No. 109-148,

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[3] The government maintains (at 27-28) that *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), applied the presumption against extraterritoriality to non-statutory claims. But *Kiobel* involved claims arising under the law of nations, and its reasoning turned on a concern unique to the Alien Tort Statute—namely, that it could apply to foreign officials in their own country. *Id.* at 1664-65.

[4] The government also invokes (at 26) the Torture Victim Protection Act and 42 U.S.C. § 1983 to show that Congress did not want aliens injured abroad by U.S. officials to have damages remedies. But the TVPA expressly excludes *any* claim against a U.S. official, regardless of where it arises, *see* 28 U.S.C. § 1350 note, and it authorizes relief for both citizens and noncitizens injured by proper defendants overseas, *see Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring). Similarly, because section 1983 provides a cause of action only for violations of federal rights by *state* officers, it is of little relevance given the lack of examples in which state officers act under color of state law outside U.S. territory.

119 Stat. 2680, 2740 (2005), for example, Congress conferred immunity on federal officers from civil (and criminal) liability for "specific operational practices" arising from interrogations of noncitizen terrorism suspects. And Congress removed federal jurisdiction over any non-habeas claim "against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba," by anyone then in military custody or previously determined to have been "properly detained as an enemy combatant." *Id.* § 1005(e)(1), 119 Stat. 2742. If, as the government argues, no damages remedy should have been available against the federal government or a federal officer in the first place, neither of these provisions should have been necessary.

That is not all. After this Court held in *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-84 (2006), that section 1005(e)(1) of the Detainee Treatment Act did not apply to "pending cases," Congress reenacted a version of the DTA language in the Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (codified at 28 U.S.C. § 2241(e)(2)), to preclude damages actions in pending cases. *See, e.g.*, *Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014) (rejecting constitutional challenge predicated on MCA's foreclosure of *Bivens* remedy); *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012). On the government's theory, all this legislation was superfluous because none of these suits was viable anyway.[5]

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[5] The government dismisses the Westfall Act entirely "because it was enacted against a backdrop of decisions holding that *Bivens* does not extend to any new context in which Congress, rather than the judiciary, is the appropriate body to establish a damages remedy." U.S. Br. 17 n.7. Even if that were a fair reading of the Westfall

(continued ...)

A more complete consideration of the choices Congress has made in this field thus demonstrates no categorical hostility to damages suits against individual officers by foreign nationals.[6] Indeed, Congress's explicit decision to exclude constitutional claims against federal officers from the FTCA shows that it understood *Bivens* actions would remain available. Pet. Br. 42; *Carlson v. Green*, 446 U.S. 14, 20 (1980). Congress may have displaced damages remedies in specific contexts—as in the Detainee Treatment Act and Military Commissions Act—but its actions do not demonstrate a wholesale displacement of judicial damages remedies covering this case.

C. Finally, the government contends (at 18-22) that only Congress can authorize the claims in this case because "claims by aliens injured abroad implicate foreign relations and national security." But that argument relies on an overly narrow view of judicial competence and a different (and at this stage impermissible) view of the facts of this case.

1. The government alludes to the possibility that a damages suit for constitutional violations arising outside

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Act—and it isn't, *see* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 132-38 (2009))—that assertion only raises, rather than settles, the question of whether the judiciary has a role in protecting constitutional rights where Congress has not.

[6] Moreover, the FCA, the IACA, and the FTCA also function as waivers of the federal government's sovereign immunity, and thus their scope "must be unequivocally expressed." *United States v. Nordic Village Inc.*, 503 U.S. 30, 33-34 (1992) (citations and internal quotation marks omitted). Damages suits against government officers in their personal capacity, in contrast, do not implicate sovereign immunity.

the United States "would inject the courts into sensitive matters of international diplomacy and risk ... 'embarrassment of our government abroad through multifarious pronouncements by various departments on one question.'" U.S. Br. 19 (quoting *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J.)). That would, perhaps, be true in cases challenging some aspect of the government's foreign policy. In *Sanchez-Espinoza*, the petitioner lodged claims against "military and foreign policy officials" arising out of high-level policy decisions to support paramilitary operations against a foreign sovereign on its own territory. 770 F.2d at 208-09. Those concerns are not implicated in this case, which involves only the use of force by a law-enforcement officer in a manner that (taking the allegations as true) U.S. domestic and foreign policy already condemns. Failing to provide a remedy—rather than judicially recognizing one—has foreign-policy ramifications. *See* Pet. Br. 47.

The government further argues (at 21) that it would intrude on foreign affairs for courts to even *attempt* "to make a judgment about whether the provision of a damages remedy to an alien injured abroad would be consistent with U.S. foreign policy." The government cannot identify a single case endorsing this cramped view of the judicial role. And its argument would foreclose *Bivens* remedies in any case where the government simply *asserts* there is a potential impact on foreign policy. But it is not beyond the federal courts' competence to separate out disputes that actually *interfere* with U.S. foreign policy from those that merely *relate* to it. *Cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("This is what courts do."). Federal courts routinely make judgments about implications for foreign policy, often at the *behest* of the federal government. *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (dis-

placing state-law claims on the ground that they interfered with foreign policy).

The government's argument, moreover, would eliminate *Bivens* actions for excessive force inside our borders, which are routinely recognized against border agents and other federal law-enforcement officers. This Court has already recognized that failing to protect foreign nationals within our borders could cause international discord. In *Arizona v. United States*, 132 S. Ct. 2492, 2498-99 (2012), the Court explained that "[o]ne of the most important and delicate of all international relationships ... has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." Rather than counseling judicial abstention, the diplomatic concerns led the Court to find a state law preempted. *See id.* The same concerns militate in favor of allowing a federal remedy for petitioners here.

2. The government's blanket invocation of "national security" as a special factor fares no better. To make its point that national security is at issue here, the government is forced to resort to allegations other than those in the complaint, which are the only facts currently before this Court at this stage. U.S. Br. 22.[7] It is true, of course, that *Bivens* suits "might ... be brought based upon military or intelligence activities," *id.* at 21, and that, in those contexts, there may well be special factors counseling hesitation. But the complaint in this case alleges that Agent Mesa was acting solely in a law-enforcement capacity at all relevant times—and that his actions were

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[7] The government asserts (at 22 n.10) that petitioners' argument depends upon a "contested depiction of the facts." At the motion-to-dismiss stage, however, it does not matter whether the allegations are "contested."

not consistent with (and, indeed, are specifically prohibited by) the regulations governing border agents. *See* Pet. Br. 46.

The government's sweeping contention (at 22) that "courts are not well-suited to distinguish between border-protection activities that do and do not implicate national security," applies equally to activities unrelated to the border that could in some hypothetical case implicate national security or foreign relations. The federal courts are not prohibited from rendering constitutional decisions that *might* have foreign policy or national security implications; they have the ability to identify which cases fall into the relevant category. Taking the allegations as true, judicial recognition of a damages remedy for the Hernández family leaves our national security and foreign policy undisturbed.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In the Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Adhering to its position below, the government opposes certiorari because it agrees with the Fifth Circuit as to both questions presented. But despite its efforts to preserve those holdings, and thereby shield the Border Patrol from judicial oversight, the government does not undermine the need for this Court's review.

On the first question, the government does not contend that the Fifth Circuit applied anything resembling this Court's "century-old" functionalist approach to extraterritoriality, as articulated in *Boumediene v. Bush*, 553 U.S. 723, 759 (2008). Nor does the government explain why applying constitutional protection in the context of a close-range, cross-border shooting would be "impracticable and anomalous"—a consideration that Justice Kennedy found critical in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

Instead, the government takes the position (like the Fifth Circuit) that *Verdugo-Urquidez* "foreclose[s]" any argument that the Fourth Amendment applies here. U.S. Br. 9. But *Verdugo-Urquidez* concerned the warrant requirement, not the prohibition on unjustified deadly force. And the tension between *Boumediene*'s functionalism and the formalist analysis of four Justices in *Verdugo-Urquidez* is a reason to grant certiorari, not deny it. The same goes for the discord between the Fifth Circuit and the Ninth Circuit—discord that has already led to opposite results on indistinguishable facts.

The government argues that constitutional protection is unnecessary because extradition or criminal proceedings are possible. U.S. Br. 12. Yet the government does not cite a single case in which the United States extradited a border guard to face charges stemming from on-duty incidents. And the lone example it gives of

a domestic criminal prosecution arising out of a cross-border shooting—an indictment issued two months after the petition was filed in this case (the first of its kind in American history)—only confirms that there is no pragmatic reason to deny constitutional protection here. In any event, it is the responsibility of the Judiciary to serve as a check on the Executive Branch—not the prerogative of the Executive to serve as a check on itself.

On the second question, the government does not dispute that, under the Fifth Circuit's decision, an officer is entitled to qualified immunity for an extrajudicial killing based solely on facts of which he was unaware when he pulled the trigger. The government offers neither a justification for the shooting nor any purpose that would be served by granting immunity. To the contrary, the government does not deny the upshot of its position: that officers would be immune from suit for even the most obviously unlawful conduct at the border, just so long as the victim is not on U.S. soil and turns out not to have been a U.S. citizen. Although the government tries to distinguish the Ninth Circuit's conflicting precedent, it barely articulates why the distinction it offers should matter. And by emphasizing the uncertainty surrounding extraterritoriality, the government only underscores the need for this Court's resolution of the first question presented, as well as the second.

In a final effort to avoid review, the government contends that this case is a poor vehicle, identifying what it says are two alternative grounds for the Fifth Circuit's judgment. But neither was addressed below or is encompassed within the questions presented, and neither stands in the way of this Court's review.

I. The government does not undermine the need for this Court's review of the Fifth Circuit's extraterritoriality holding.

As explained in the petition (at 13-18), *Boumediene* makes clear that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. That functionalist approach, embodied in cases stretching back over a century, focuses on whether extraterritorial application of a particular constitutional provision, in a particular context, would be "impracticable and anomalous." *Boumediene*, 553 U.S. at 759-60. And Justice Kennedy, in his *Verdugo-Urquidez* concurrence, "appl[ied]" this functional "extraterritoriality test" (as *Boumediene* put it, *id.* at 760), ultimately concluding that practical concerns dictate that "the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." 494 U.S. at 278.

The government does not contest any of this. Yet, like the Fifth Circuit, it takes the position that a different provision of the Fourth Amendment—its prohibition on unjustified deadly force—has no application beyond the border, regardless of whether applying the prohibition in this context would be impracticable or anomalous. That position cannot be reconciled with this Court's functionalist approach. And the government barely attempts to argue otherwise.

Nevertheless, the government makes three arguments why this Court's review is unwarranted: (1) *Verdugo-Urquidez* controls, (2) practical concerns would "support" the decision below anyway, and (3) there is no divergence between the Fifth Circuit's opinion and the Ninth Circuit's approach. None is persuasive.

1. The government first argues (at 9) that *Verdugo-Urquidez* "foreclose[s]" any possibility that the Fourth Amendment applies here. Seizing on a single sentence in

Justice Kennedy's concurrence and ignoring the rest of his opinion, the government relies on his statement that he "d[id] not believe" that his views "depart[ed] in fundamental respects from the opinion of the Court, which [he] join[ed]." 494 U.S. at 275. But Justice Kennedy expressly disagreed with the plurality's formalist analysis. *Id.* at 276-77. And the pragmatic concerns he identified were specific to the warrant requirement. *Id.* at 278 ("The conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous.").

Particularly in light of Justice Kennedy's concurrence and the Court's later decision in *Boumediene*, *Verdugo-Urquidez* should not be read to foreclose the possibility that some other part of the Fourth Amendment might, in narrow circumstances, apply to noncitizens beyond the border. And although the government argues to the contrary, it does not disagree with our core point: that an expansive reading of *Verdugo-Urquidez*—extending its formalist analysis to a case with radically different facts, involving a different constitutional provision—is inconsistent with this Court's functionalist approach. That is reason enough to grant certiorari.

Nor is the Court's brief, ancillary discussion of "practical considerations" in *Verdugo-Urquidez* relevant here. U.S. Br. 10. The Court discussed those considerations only at the end of its opinion, as an additional reason to reject the "global," "all-encompassing view of the Fourth Amendment" that had been adopted by the lower court. 494 U.S. at 268-69. Citing concerns about the prospect of having judges reviewing military decisions "aris[ing] half-way around the globe," the Court declined to adopt the "sweeping proposition" that "federal officials are constrained by the Fourth Amendment wherever and against whomever they act." *Id.* at 270, 274-75.

But that is not our argument. Our theory is far narrower: that the Fourth Amendment's prohibition on unjustified deadly force applies at the border, at least where (as here) the agent was on U.S. soil and fired his weapon at close range. Whatever practical concerns might attend applying constitutional protection in these circumstances, they have nothing to do with the specific concerns discussed in *Verdugo-Urquidez*.

2. This leads to the government's second argument: that the question does not deserve this Court's attention because pragmatic factors, had they been considered by the Fifth Circuit, would "support" its conclusion. U.S. Br. 13. Strikingly, however, the government itself does not even assert that applying constitutional protection in this context would be "impracticable and anomalous." *Boumediene*, 553 U.S. at 759-60.

And how could it? Two months after the petition was filed in this case, the government "brought a federal murder charge against another border patrol agent who was in the United States when he shot and killed a Mexican citizen in Mexico," U.S. Br. 12—"the first Border Patrol agent to be prosecuted by the Department of Justice for a cross-border shooting." Binelli, *10 Shots Across the Border*, N.Y. Times, Mar. 3, 2016 (Magazine), http://nyti.ms/21KKuXM. Even setting aside the indictment's timing, the possibility of criminal prosecution only shows that there is nothing impracticable or anomalous about applying constitutional protection here. If cross-border shootings fall within the "jurisdiction of the United States" under the federal-murder statute, 18 U.S.C. § 1111(b), then why shouldn't the constitutional prohibition on unjustified deadly force also apply? The government does not say. It makes a vague reference to diplomacy (at 13), but the only foreign nation affected supports a remedy in this case. *See* Gov't of Mexico Br. 3.

If anything, it would be anomalous to *not* afford constitutional protection here. On the government's theory, the Fourth Amendment applies if a border guard (a) kills an American citizen on either side of the border, (b) kills a foreign citizen with significant voluntary connections on either side of the border, or (c) kills a foreign citizen on the U.S. side of the border. Only if the victim happens to be a foreign citizen without significant voluntary connections, standing on the Mexican side of the border, does the Fourth Amendment not apply. And even in that scenario, the government believes that the agent may be criminally prosecuted. This patchwork regime might benefit the Border Patrol, but allowing "the applicability of the Fourth Amendment" to "turn on [such] fortuitous circumstance[s]" has little to recommend it as a practical matter. *Cf. Verdugo-Urquidez*, 494 U.S. at 272.

3. Finally, the government (at 13-15) tries to reconcile the Fifth Circuit's formalistic approach with the Ninth Circuit's more pragmatic approach, illustrated by *Ibrahim v. Department of Homeland Security*, 669 F.3d 983 (2012). But the government does not dispute that the Ninth Circuit's divergent precedent has already been applied to virtually identical facts and produced a diametrically opposite result. *See Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015) (reproduced at 153a).[1] Nor does the government say a word about the confusion surrounding the meaning of *Verdugo-Urquidez*, which *Boumediene* has only exacerbated. *See* Pet. 20-21.

This Court should not let these divergent approaches fester. It should take the opportunity to resolve the

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[1] *Rodriguez* did not, as the government maintains (at 14), "require[] a 'substantial voluntary connection,'" but treated the factor as one of many that courts must consider in deciding whether to apply a constitutional provision extraterritorially. App. 172a-73a.

confusion, "clarify the reach of *Boumediene*[,] and apply Justice Kennedy's functional test" to these "recurring" facts. App. 33a, 43a (Prado, J.).

II. The government does not undermine the need for this Court's review of the Fifth Circuit's qualified-immunity holding.

This Court should also grant certiorari to review the Fifth Circuit's qualified-immunity holding. The practical consequences of leaving that holding in place are indisputable. If allowed to stand, officers will be able to escape liability for the most "obvious" acts of lawlessness, *Hope v. Pelzer*, 536 U.S. 730, 745 (2002)—even murder—based on facts unknown to them at the time.

That outcome would not remotely serve qualified immunity's purposes, and the government does not contend that it would. Qualified immunity is not an end in itself. It is a judge-made doctrine that aims to balance "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Thus, qualified immunity seeks to protect officers when they lack "notice [that] their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). But it is not designed to shield wrongdoers from liability when "the unlawfulness of the alleged conduct should have been apparent." *Hope*, 536 U.S. at 743. Qualified immunity "provide[s] no license to lawless conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

By making immunity turn on later-discovered facts—the victim's citizenship, ties to the U.S., and precise location—the Fifth Circuit has erected a rule that does not in any way advance the aims of the doctrine. Under the Fifth Circuit's holding, Agent Mesa would not

have received immunity if Sergio were a U.S. citizen, had significant ties to the U.S., or were on the U.S. side of the border when he was shot. If any of those things were true, the Fourth Amendment would apply—on any reading of *Verdugo-Urquidez*—and the allegations in the complaint would make out a violation of clearly established law without the need to consider whether the Fifth Amendment applies. The government does not disagree.

The government seeks to dismiss the Fifth Circuit's reliance on later-discovered facts as "at most" an "implicit[]" holding. U.S. Br. 15. But we vigorously argued in our en banc briefing that these facts "cannot immunize Defendant Mesa's actions taken without [their] knowledge." CA5 Supp. Br. 43, 45-47. The en banc court nevertheless gave Mesa immunity because he was not "reasonably warned" that his conduct "violated the Fifth Amendment," given that Sergio was "an alien who had no significant voluntary connection to, and was not in, the United States." App. 5a. These later-discovered facts were thus central to the Fifth Circuit's conclusion that Sergio had no "clearly established" constitutional right.

Rather than defending the Fifth Circuit's decision, the government insists on rewriting it. The government asserts (at 16) that the qualified-immunity holding rests on a lack of clarity as to the antecedent question whether "an excessive-force claim could be amenable to substantive-due-process analysis at all." But the government conjures that rationale out of thin air. The per curiam opinion does not question that an excessive-force claim may generally be stated under the Fifth Amendment. Instead, it asks whether "Mesa's conduct violated the Fifth Amendment" given Sergio's citizenship status and physical location. App. 5a-6a. In concluding that there is

no "clearly established" answer, the decision necessarily turns on later-discovered facts.

That conclusion is not just wrong; it also conflicts with the Ninth Circuit's decision in *Moreno v. Baca*, 431 F.3d 633 (2005). The government hardly grapples with this split, instead trying to distinguish *Moreno* (at 18) because "[t]he nature of the legal question" differed there. But as *Rodriguez* shows, that is a distinction without a difference: It reached the opposite result on facts indistinguishable from those here. App. 179a. That the "legal question" in *Rodriguez* and *Moreno* concerned Fourth Amendment "reasonableness" is irrelevant. *Rodriguez* itself acknowledged that its qualified-immunity holding directly "contravenes" the Fifth Circuit's decision, and commentators have said the same. *Id.* 178a; *see* Vladeck, *Cross-Border Shootings as a Test Case*, Just Security, July 10, 2015, http://bit.ly/1KeG31y.

It is intolerable that officers patrolling the border in Texas (but not Arizona or California) may now escape liability by retroactively manufacturing uncertainty. That outcome does not serve qualified immunity's purposes, and this Court should grant certiorari to say so.

III. This case is an ideal vehicle to address the questions presented.

Given everything at stake, there is no good reason to deny certiorari. Although the government contends (at 19) that this case is a "poor vehicle" to resolve the questions presented, it does not identify any genuine impediments to review on either question. Nor does it contest any of the factual allegations or background information detailed in the petition. And the government is conspicuously silent on the Border Patrol's use-of-force regulations, its well-documented history of unaccountability, and the recurring nature of these incidents. *See* Binelli,

10 Shots Across the Border; Becker, *Scathing report deems fatal Border Patrol shooting 'highly predictable'*, Center for Investigative Reporting, Mar. 4, 2016, http://bit.ly/1S2VN96.

Instead, the government proposes two possible "alternative grounds" for the Fifth Circuit's judgment. U.S. Br. 19. Neither was considered by that court, and neither poses a barrier to this Court's resolution of the questions presented.

1. The first proposed alternative ground (at 19-20) is that "the judicially inferred *Bivens* remedy should not be extended" to this context. But, as the government concedes (at 20), "the en banc court of appeals did not address this question," and the panel "concluded that no special factors counsel hesitation before extending the *Bivens* remedy." *See* App. 95a.

This Court's precedents do not compel a contrary conclusion. Although the government contends (at 20-21) that this lawsuit implicates "national security and international diplomacy," the panel concluded that it "involves questions of precisely *Bivens*-like domestic law enforcement and nothing more," App. 98a—a conclusion bolstered by the recent criminal prosecution on similar facts. And the government of Mexico supports "mak[ing] available an effective remedy" to individuals seeking "redress for unjustified violence by U.S. border officers." Gov't of Mexico Br. 7. Any *Bivens* questions, however, can be addressed on remand. They are no obstacle to this Court's review.

2. The government's second proposed alternative ground—that the action against Mesa is precluded by the Federal Tort Claims Act's judgment bar, 28 U.S.C. § 2676—fares no better. No court below passed on this question. Nor did Mesa preserve the issue. The FTCA's judgment bar "functions in much the same way" as "tra-

ditional res judicata." *Will v. Hallock*, 546 U.S. 345, 354 (2006). And like res judicata, it is "an affirmative defense ordinarily lost if not timely raised." *Arizona v. California*, 530 U.S. 392, 410 (2000). Because Mesa "failed to present this argument to the district court"—or even on appeal—he has "waived review of the issue." *E.A.F.F. v. Gonzalez*, 600 F. App'x 205, 209 (5th Cir. 2015), *cert. denied*, 135 S. Ct. 2364 (2015) (holding FTCA's judgment bar waived). Mesa's only mention of the judgment bar was in his supplemental en banc brief. He did not even raise the defense in opposing certiorari, and the government cannot now raise it for him. The defense is thus unavailable to him, regardless of what this Court decides in *Simmons v. Himmelreich*, No. 15-109.

In any event, the judgment bar is inapplicable here. The district court dismissed the claims against the United States under an FTCA exception, 28 U.S.C. § 2680(k). And the statute says that when an exception applies, "[t]he provisions of this chapter"—including the judgment bar—"shall not apply." *Id.* § 2680. Thus, even if the issue were properly preserved, the judgment bar would not be an "independent basis" for dismissal. U.S. Br. 22. It thus poses no barrier to this Court's ability to review the important questions cleanly presented here.

CONCLUSION

The petition for certiorari should be granted.

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IN THE

Supreme Court of the United States

JESUS C. HERNÁNDEZ, *et al.*,

Petitioners,

—v.—

JESUS MESA, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES, THE ACLU FOUNDATION OF TEXAS, THE ACLU FOUNDATION OF ARIZONA, AND THE ACLU OF NEW MEXICO, IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.6, no party's counsel authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No party or entity other than *amici*, their members, or their counsel, made a monetary contribution to this brief's preparation or submission. Additionally, letters of consent to the filing of *amicus curiae* briefs have been lodged with the Clerk of the Court.

INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU Foundation of Arizona, the ACLU Foundation of New Mexico, the ACLU Foundation of San Diego and Imperial Counties, and the ACLU Foundation of Texas are the four ACLU state affiliates along the U.S.-Mexico border.

The ACLU, through its Immigrants' Rights Project and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens. *Amici* have a longstanding interest in enforcing constitutional and statutory constraints on the federal government's immigration enforcement activities at the border. *Amici* have also developed significant expertise on the question of the extraterritorial application of constitutional rights.

The ACLU currently represents Araceli Rodriguez in her claims against U.S. Border Patrol Agent Lonnie Swartz for the cross-border shooting of her teenage son, J.A., a Mexican national who was standing in Nogales, Sonora, Mexico at the time of the shooting. *Rodriguez v. Swartz*, No. 15-16410 (9th Cir. 2015).[1] *Amici* also litigated *Ali v. Rumsfeld*,

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[1] The district court in *Rodriguez* concluded that that it would not be impracticable or anomalous to apply the Fourth Amendment. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1033-38 (D. Ariz. 2015). The Ninth Circuit held argument on defendant's appeal of the denial of his motion to dismiss on

649 F.3d 762 (D.C. Cir. 2011), and filed an *amicus* brief in *Boumediene v. Bush*, 553 U.S. 723 (2008). Both of those cases considered the extraterritorial application of constitutional rights.

Amici also have expertise regarding the *Bivens* question added by the Court, including having filed an *amicus* brief in *Bivens* itself. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The ACLU has also litigated numerous other *Bivens* cases before this Court and the lower courts.

Because this case raises important questions regarding the extraterritorial application of the Constitution and the availability of *Bivens* remedies, its proper resolution is a matter of great concern to the ACLU, its affiliates, and its members.

STATEMENT OF CASE

The parents of Sergio Adrian Hernandez-Guereca ("Sergio"), a 15-year-old Mexican boy who was fatally shot by United States Border Patrol Agent Jesus Mesa, Jr., brought this *Bivens* action alleging that Agent Mesa is liable for using deadly force against Sergio in violation of the Fourth and Fifth Amendments.[2] As alleged, on June 7, 2010, Sergio was playing with his friends along a concrete culvert where the Rio Grande once flowed directly adjacent to the barbed-wire fence separating El Paso,

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October 21, 2016, but postponed a decision on the matter until after resolution of the present case.

[2] *Amici*'s recitation of the allegations is taken from the Fifth Circuit's panel opinion. *See Hernandez v. United States*, 757 F.3d 249, 255-57 (5th Cir. 2014).

Texas from Juarez, Mexico. They were playing a game in which they would run up the steep banked incline and attempt to touch the U.S. border fence. As they were playing, Agent Mesa arrived on the scene and detained one of Sergio's friends, causing everyone else, including Sergio, to run away. Sergio ran to a pillar beneath a bridge on the Mexican side. Though Sergio was unarmed, Mesa drew his gun while standing on U.S. soil and shot at least twice at Sergio. One of the bullets struck Sergio in the face and killed him.

The district court dismissed the Fourth and Fifth Amendment claims against Agent Mesa, and a divided panel of the Fifth Circuit affirmed in part and reversed in part. The panel held that the functional approach set forth in *Boumediene* governs the extraterritorial application of the Fourth and Fifth Amendments, but concluded that even under a functional approach, Sergio's lack of voluntary connections precluded the extension of Fourth Amendment rights. *See Hernandez*, 757 F.3d at 259-67. The panel held, however, that under the same functional approach, the Fifth Amendment claim could proceed. *Id.* at 268-72. The panel also rejected the government's argument that a *Bivens* cause of action was unavailable in this context. *Id.* at 272-77.

On rehearing en banc, the Fifth Circuit issued a short per curiam decision reversing the panel. The court summarily stated, without analysis, that the extraterritorial application of the Fourth Amendment was controlled by the voluntary connections test set forth by the plurality in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and not the functional test from the later-decided

Boumediene. *See Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc) (per curiam). Applying *Verdugo-Urquidez*, the en banc court held that "a Mexican citizen who had no 'significant voluntary connection' to the United States" and who was in Mexico when shot could not assert a claim under the Fourth Amendment. *Id.* (quoting *Verdugo-Urquidez*, 494 U.S. at 271). On the Fifth Amendment claim, the court bypassed the merits, noting disagreement among the en banc panel as to whether the functional approach under *Boumediene* applied, and instead ruled that Agent Mesa was entitled to qualified immunity because the extraterritorial application of the Fifth Amendment was not clearly established on these facts. *Id.* at 119-21.

SUMMARY OF ARGUMENT

1. A *Bivens* cause of action should be available in this context. *Amici* write specifically to address two arguments made by the United States in opposing recognition of a *Bivens* remedy. First, the possibility of criminal charges against a Border Patrol agent does not provide an adequate alternative remedial scheme sufficient to outweigh the need for a civil remedy under *Bivens*. Even when the government decides to prosecute criminally, the mere possibility of a conviction and restitution does not preclude a *Bivens* remedy. Potential criminal remedies will be available in almost all cases of willful violations of constitutional rights, so this position would eviscerate *Bivens*. Further, such a rule would give the federal government sole discretion to decide when compensation for unlawful conduct by its own officials could be made available, effectively leaving the federal government

accountable only to itself. Indeed, in *Bivens* itself this Court recognized a cause of action even though the defendant federal agents were subject to criminal prosecution.

Second, the Court should reject the United States' argument that the extraterritorial character of the constitutional violation itself amounts to a special factor foreclosing a *Bivens* remedy. As the Fifth Circuit panel correctly recognized, the special factors analysis is not an opportunity to "double count" the very same arguments raised on the constitutional merits. If it is neither impracticable nor anomalous to apply a particular constitutional right extraterritorially, then there is no "special" concern that would warrant the refusal to recognize a remedy under *Bivens* for that constitutional violation.

2. The extraterritorial application of the Fourth and Fifth Amendments is governed by the functional "impractical and anomalous" test reaffirmed in *Boumediene*. The Fifth Circuit's rejection of that test in favor of an exclusive consideration of whether the victim had "significant voluntary connections" to the United States is particularly inappropriate in the context of a cross-border shooting. Such personal connections are of little relevance to the question of whether a civilian living just across the border should be denied any remedy for the use of lethal force against him by U.S. officials just over the border—a use of force that is illegal under all applicable laws, would be a clear constitutional violation if the victim were on the U.S.

side of the border line, and would, in a domestic setting, give rise to a claim for damages.

3. Because the court below applied the incorrect legal standard, and has not yet had an opportunity to apply the *Boumediene* functional test to these facts, *amici* suggest a remand to permit the court to apply the correct test in the first instance. In this brief, we set forth some of the considerations that might inform such an inquiry.

ARGUMENT

I. NEITHER THE POSSIBILITY OF A CRIMINAL CONVICTION FOR THE UNDERLYING MISCONDUCT NOR EXTRATERRITORIALITY PRECLUDES A *BIVENS* REMEDY.

Amici agree with Petitioners that a *Bivens* remedy is available here and will not repeat that general analysis. *Amici* write solely to address two arguments the United States has previously raised.

1. In *Rodriguez v. Swartz*, the ACLU's case currently pending before the Ninth Circuit, the United States has argued that a *Bivens* remedy should be barred when a Border Patrol agent could be or is in fact criminally prosecuted for the underlying misconduct. *See* Br. for United States as *Amicus Curiae* at 18, *Rodriguez v. Swartz*, No. 15-16410 (9th Cir. Feb. 29, 2015); *see also Hernandez*, 757 F.3d at 274 (panel opinion rejecting possible criminal prosecution as a reason to foreclose a *Bivens* remedy); U.S. Br. in Opp'n to Pet. for Cert. at 12. This argument cannot be squared with this Court's precedent, and should be rejected.

Criminal prosecutions against federal officials for unconstitutional actions are often at least potentially available, but in practice are extremely rare. Thus, as in the vast majority of alleged constitutional violations by federal agents, the Department of Justice declined to prosecute Agent Mesa here for possible violations of federal criminal statutes.[3] But even when the government decides to bring charges—as it has, for the first time ever for a cross-border shooting, against the Agent in *Rodriguez*—a conviction and restitution remain far from a certainty. The burden of proof for a criminal conviction and the legal standards governing criminal liability are generally much more demanding than for civil liability. The mere possibility of criminal restitution is not an adequate remedy.

Permitting the possibility of criminal charges and restitution to dictate whether a *Bivens* remedy is available would also effectively accord the executive branch exclusive control over redress for and deterrence of the unconstitutional actions—including fatal actions—of its own officers. As illustrated here, there certainly is no guarantee that any particular case will result in an indictment, much less a conviction. The federal government could thus deny a victim any monetary relief and escape liability altogether by simply declining to prosecute. Not surprisingly, therefore, this Court has never denied

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[3] Dep't of Justice, Office of Public Affairs, Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca, *available at* https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca (Apr. 27, 2012).

the availability of a *Bivens* remedy based on a grant of restitution, much less the *possibility* that the government will bring charges, secure a conviction, and obtain restitution for the victim.

Moreover, the argument that criminal law should displace a *Bivens* remedy proves too much. If the possibility of restitution were enough to foreclose a *Bivens* claim, there would be no *Bivens* remedy for *any* civil rights violations that could be subject to prosecution. That rule would swallow *Bivens*, as a criminal conviction and restitution is theoretically available for *any* willful violation of constitutional rights. *See* 18 U.S.C. §§ 242, 3663.

Notably, *Bivens* itself involved conduct that could have been subject to criminal prosecution. The Second Circuit's decision in *Bivens*—ultimately reversed by this Court—specifically noted the existence of three federal crimes that could apply to the agents' conduct there and cited that as a factor in its decision declining to permit a civil remedy. *See Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 409 F.2d 718, 724-25 (2d Cir. 1969) ("Congress has made it a federal crime to execute a search warrant with unnecessary severity or to exceed willfully one's authority in executing it, 18 U.S.C. § 2234; to procure the issuance of a search warrant maliciously and without probable cause, 18 U.S.C. § 2235; and, in certain circumstances, to search an occupied private building without a warrant, 18 U.S.C. § 2236."). [4] Nevertheless, the

[4] The criminal nature of the alleged conduct was also noted in the petitioner's brief in *Bivens*. Br. for Pet'r at 16, *Bivens*, 403 U.S. 388 (explaining that the alleged search and seizure was "punishable by criminal penalties under 18 U.S.C. § 2236").

Court held that a civil remedy for Fourth Amendment violations was available in *Bivens*. The Court should likewise reject any attempt to rely on the possibility of a criminal prosecution to foreclose a *Bivens* remedy here.

2. The United States has also argued that extraterritoriality considerations constitute a special factor foreclosing a *Bivens* remedy in the context of cross-border shootings. U.S. Br. in Opp'n to Pet. for Cert. at 20-21. That is likewise incorrect.

As the Fifth Circuit panel in this case rightly recognized, the United States' suggestion to "double count" extraterritorial considerations is "improper." *Hernandez*, 757 F.3d at 276 n.12. Where, as here, the nature of the right and the circumstances of the case outweigh other concerns and justify extraterritorial application of the Constitution, those same concerns offer "no additional reason to hesitate in granting a remedy for that right." *Id.*; *cf. Davis v. Passman*, 442 U.S. 228, 246 (1979) (rejecting the argument that *Bivens* should not apply to a Congressman's official conduct because the asserted "special concerns" were "coextensive with the protections" already afforded under the Speech or Debate Clause). If extending a constitutional claim extraterritorially is not anomalous or impracticable, then the extraterritorial character of the claim similarly does not provide a reason not to provide a remedy in damages.

Permitting this form of double counting could eliminate *Bivens* altogether. Nearly every constitutional analysis involves competing considerations that, in the abstract, could be

reframed as "special factors." *Cf. Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (noting that Eighth Amendment prison condition claim implicated "the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system"); *Carlson v. Green*, 446 U.S. 14, 19 (1980) (holding that such prison conditions claims "involve[] no special factors counseling hesitation" in granting a *Bivens* remedy). Moreover, a blanket rule against extraterritorial *Bivens* actions would effectively immunize *all* violations of constitutional rights abroad, including those directed against U.S. citizens. The Court should reject the United States' argument, which is little more than an attempted second bite at the extraterritoriality apple.

II. THE FIFTH CIRCUIT'S REQUIREMENT OF VOLUNTARY CONNECTIONS IS PARTICULARLY INAPPROPRIATE IN THE CONTEXT OF A CROSS-BORDER SHOOTING.

Amici agree with Petitioners that the Fourth and Fifth Amendments' extraterritorial application is governed by the functional "impracticable and anomalous" test reaffirmed in *Boumediene*, 553 U.S. at 759-60. The Fifth Circuit, however, citing *Verdugo-Urquidez*, applied a rigid, formalistic requirement that a victim must have voluntary connections to the United States in order for the Fourth Amendment to apply extraterritorially. *Hernandez*, 785 F.3d at 119. That was incorrect, as explained in Petitioners' brief. *Amici* write to underscore that the Fifth Circuit's requirement of

voluntary connections is particularly inappropriate in the context of a cross-border shooting.

In some cases, an individual's particular connections to the United States may weigh heavily in the functional analysis. *Cf. Boumediene*, 553 U.S. at 760 (explaining that, in addition to practical considerations, the U.S. citizenship of the petitioners in *Reid v. Covert*, 351 U.S. 487 (1956) "was a key factor" in finding the jury trial right applicable). *See also, e.g., Ibrahim v. Dep't of Homeland Security*, 669 F.3d 983, 995-97 (9th Cir. 2012) (applying the *Boumediene* functional test and emphasizing the noncitizen plaintiff's connections to the United States in holding that she could invoke the First and Fifth Amendments to challenge her inclusion on the no-fly list).

This case, however, concerns limits on the unlawful use of deadly force by law enforcement—protections that could not be more fundamental. *See Boumediene*, 553 U.S. at 758-59 (noting that even in unincorporated territories where constitutional rights do not always apply, the Court still held that noncitizens were entitled to "fundamental" rights); *Tennessee v. Garner*, 471 U.S. 1, 9 (1985) (explaining that the "intrusiveness of a seizure by means of deadly force is unmatched" and a "suspect's fundamental interest in his own life need not be elaborated upon"). And Petitioners seek to assert them against a U.S. official who fired his gun *within* the United States and killed someone just across the border.

The Fifth Circuit's requirement of particular connections to the United States would mean that

individuals without such connections, who are simply living their lives in proximity to the U.S. border, have no judicially enforceable right not to be killed by U.S. agents shooting at them across the border. It would mean that if a Border Patrol agent were to unjustifiably shoot and kill two young people standing side by side just over the border—one with significant voluntary connections and the other without them—the applicability of the constitutional protections against arbitrary death would turn on irrelevant considerations regarding the particular connections each minor might have to this country.[5] That is not, and cannot be, the correct constitutional rule.

Indeed, to the extent that connections to the United States are relevant at all in the context of cross-border shootings, what matters most is not one's specific connections but the unavoidable connection to the United States that border communities and the people who live in them often share. This point is illustrated by the circumstances of *Rodriguez*.[6] J.A. was shot approximately four

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[5] The decedents in both this case and *Rodriguez* were minors. The Fifth Circuit required *voluntary* connections; yet minors often have little say in where they live or what other connections they may or may not form.

[6] The allegations below relating to the shooting death of J.A. are taken from the first amended complaint in *Rodriguez v. Swartz*, No. 14-cv-2251, Doc. 18 (filed Sept. 10, 2014), except where otherwise noted. In finding that J.A. was protected by the Fourth Amendment at the time of the shooting, the district court noted, among other things, that "J.A. had strong familial connections to the United States"—J.A.'s grandmother and grandfather (lawful permanent residents of the United States at the time of the shooting and now U.S. citizens) frequently

blocks from his home. He was walking on a busy pedestrian thoroughfare alongside the border fence, where there are numerous stores, medical offices and other places which the residents of Nogales visit every day. An individual's particular connection to the United States is not determinative, particularly where, as here, the community and its residents have a shared day-to-day connection to the United States, and are routinely subjected to the conduct of its agents. In light of the fundamental right at issue in these cases, the Fifth Circuit's requirement of voluntary connections above and beyond simply living one's life in a border community is incorrect and should be rejected.

III. THE COURT SHOULD REMAND FOR THE LOWER COURTS TO APPLY THE FUNCTIONAL "IMPRACTICAL AND ANOMALOUS" TEST IN THE FIRST INSTANCE.

If the Court reverses the Fifth Circuit's rejection of the *Boumediene* test for an exclusive application of the "voluntary connections" test, *amici* suggest that the Court should remand to the lower courts to apply in the first instance the fact-intensive, multi-factor functional analysis that properly governs. Where a lower court applies the wrong standard, this Court will generally correct the error and remand for the court below to apply the correct standard in the first instance. *See, e.g., eBay Inc. v.*

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travelled the short distance across the border to J.A.'s home to take care of him while his mother was away for work. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1036 (D. Ariz. 2015).

MercExchange, L.L.C., 547 U.S. 388, 394 (2006); *Johnson v. California*, 543 U.S. 499, 515 (2005).

To *amici*'s knowledge, no lower court has applied the correct, functional analysis to a cross-border shooting free from the misconception that a "voluntary connections" requirement applies. *See Hernandez*, 785 F.3d at 119 (en banc court applying a rigid rule derived from *Verdugo-Urquidez*); *Hernandez*, 757 F.3d at 266 (earlier panel attempting to apply *Boumediene* while viewing itself as "bound to apply the sufficient connections requirement of *Verdugo-Urquidez*"); *Ibrahim*, 669 F.3d at 997 (9th Cir. 2012) (similarly trying to reconcile *Boumediene* and *Verdugo-Urquidez*); *Rodriguez*, 111 F. Supp. 3d at 1035 (applying *Ibrahim* to a cross-border shooting). Because no court has yet grappled with the relevant factors under the proper analysis, *amici* respectfully suggest that this Court reiterate the correct standard—including clarifying that there is no requirement of "voluntary connections"—and remand for application of the standard in the lower courts.

This would permit the lower courts to apply in the first instance the factors relevant to the fact-specific "impracticable and anomalous" test in the context of this case. Among the factors to be considered under the functional test are practical obstacles inherent in enforcing the right extraterritorially, the nature and location of sites at which the shooting occurred, the status of the individual claiming the right, and the nature of the right itself. *Boumediene*, 553 U.S. at 766, 798. *Amici* write to expand on Petitioners' discussion of the

considerations that may be relevant to the application of the correct analysis.

1. A variety of considerations may bear on whether application of the asserted rights would present practical problems or create anomalous results. Among other things, courts should consider whether the asserted constitutional right would impose different obligations and standards than are already in place in a particular setting. *See id.* at 757 (noting that in the so-called Insular Cases the Court placed some limitations on the extraterritorial application of the Constitution to unincorporated territories given the risk of "uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in . . . these newly acquired Territories").

Here, Border Patrol agents are already subject to restrictions on the use of deadly force during engagements with both citizens and noncitizens on *both* sides of the border. *See* 8 C.F.R. § 287.8(a)(2)(ii) (2012) ("Deadly force may be used only when . . . necessary to protect the [agent] or other persons from the imminent danger of death or serious physical injury."). Moreover, federal and state criminal laws prohibit a Border Patrol agent on U.S. soil from using unlawful deadly force against noncitizens across the border, regardless of the victim's citizenship status or connections to the United States. *See, e.g.*, 18 U.S.C. § 1111; Tex. Penal Code § 19.02; Ariz. Rev. Stat. § 13-1104(A). Thus where, as here, a federal official acts within the United States, there is nothing anomalous or impracticable about holding him accountable to federal constitutional constraints. That the application of

constitutional provisions under such circumstances would impose no new duties is an indication that the particular application of the Constitution would be neither impracticable nor anomalous.

By contrast, the application of other constitutional requirements in other contexts may present practical problems not implicated by cross-border shooting cases. *See, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 274 (plurality opinion) (rejecting application of the warrant requirement to an extraterritorial search, explaining that a warrant issued by a U.S. magistrate under certain circumstances "would be a dead letter outside the United States"); *id.* at 278 (Kennedy, J., concurring) (noting practical and procedural problems with requiring a warrant for a search in Mexico, including the "absence of local judges or magistrates available to issue warrants"); *id.* at 279 (Stevens, J., concurring in the judgment) (similar).

Practical problems may also arise where the application of certain constitutional protections would require interpretation of differing or uncertain societal norms and obligations abroad. For example, the concerns in *Verdugo-Urquidez* about creating a "sea of uncertainty" were unique to the application of the warrant requirement and "what might be reasonable in the way of searches and seizures conducted abroad." *Id.* at 274; *id.* at 278 (Kennedy, J., concurring) (observing that application of the warrant requirement would involve "the need to cooperate with foreign officials" and implicate "the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad"). In contrast, Border Patrol agents would face no

uncertainty as to the standard governing the use deadly force across the border.

Boumediene demonstrates that even where the application of the Constitution may well affect sensitive national interests, such as national security or military operations abroad, courts must carefully weigh such concerns against other relevant considerations favoring extraterritorial application. In *Boumediene*, the Court acknowledged that allowing habeas challenges at Guantanamo could impose very real burdens and "may divert the attention of military personnel from other pressing tasks." 553 U.S. at 769. The Court nonetheless held that the Suspension Clause applied and stressed that the practical problems were outweighed by other factors, including the importance of ensuring that fundamental constitutional protections were available. *Id.* at 766-71, 793-97. This case presents nothing remotely approaching the practical concerns at issue in *Boumediene*.

2. The nature and location of the sites at which the relevant events occurred is also a relevant factor in determining whether the application of a particular constitutional right would be impracticable or anomalous. This factor may require, for example, an evaluation of the degree of control exercised by the United States over the area in which the events occurred. *Id.* at 763-69.

In the context of a cross-border shooting, the degree of U.S. control is an important factor that should be applied on the facts of each case under *Boumediene*'s functional test. U.S. control is not consistent along the long stretch of the U.S.-Mexico border, which ranges from heavily fortified and

controlled portions to undeveloped areas. In *Rodriguez*, for example, J.A. was shot in an area dominated by the presence of the border fence and U.S. authority. At the time of his death, J.A. was walking on a commercial street that runs alongside and directly below the fence. Agent Swartz shot J.A. while standing at a location on the U.S. side of the border set at the top of a cliff rising approximately 25 feet above the ground on the Mexican side, through a steel border fence rising another approximately 25 feet in the air. As alleged in the *Rodriguez* complaint, U.S. Border Patrol agents use a variety of means to exert *de facto* control over the border fence area where J.A. was killed, including by constantly surveilling both sides of the border through cameras and other devices; firing guns and launching non-lethal devices, such as pepper spray, into Mexico; conducting helicopter patrols in Mexican airspace; and engaging in authorized pre-inspection of individuals on Mexican soil.

The application of the Fourth and Fifth Amendments to the killing of a minor civilian in an area under this level of U.S. control presents none of the potential practical concerns that could be created by the assertion of constitutional rights in an "active theater of war." *Id.* at 770. And it is hardly anomalous to expect a Border Patrol agent whose conduct at issue occurred entirely while standing on U.S. soil, subject to complete governmental control, and who shot into a localized U.S.-dominated area in Mexico, to abide by the same Fourth Amendment limits on the use of deadly force that he must obey when shooting at an individual on this side of the border. By contrast, for example, U.S. agents in *Verdugo-Urquidez* were "working in concert" with

Mexican police to conduct the search in Mexico, and were thus subject to the approval and oversight of the Mexican government. 494. U.S. at 262 (plurality opinion).

The degree of control over an area, however, is just one factor. Notably, for example, Justice Kennedy provided a litany of practical reasons why the warrant requirement did not apply in the interior of Mexico in *Verdugo-Urquidez*, among them that no federal court had authority to issue a warrant for searches there. 494 U.S. at 278 (Kennedy, J., concurring). Had the lack of U.S. control of the search site in Mexico been sufficient, there would have been little need for further analysis. *See Boumediene*, 553 U.S. at 763 (making a similar point with regard to the significance of the "discussion of practical barriers" in *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

Other fact-specific aspects of the sites of the violation may also bear on the functional impracticable and anomalous analysis. For example, the application of constitutional rights is not anomalous in the context of border communities that—like "Ambos Nogales," or "Both Nogales," a common name for Nogales, Sonora, Mexico and Nogales, Arizona—are linked by a shared history, culture, and economy. *See* Br. for Scholars of U.S.-Mexico Border Issues as *Amici Curiae* Supporting Plaintiff-Appellee at 3, *Rodriguez v. Swartz*, No. 15-16410 (9th Cir. May 6, 2015) ("For many decades, there was no meaningful barrier between Nogales, Arizona and Nogales, Sonora, and today, the cities remain essentially identical in demographics, bound together by crossborder families, economic

interdependence, and a binational cultural unity."). Under circumstances in which citizens of each country and those with and without connections across the border mix and cross on a daily basis, as they do in Ambos Nogales, the application of uniform constitutional standards governing the use of deadly force to all potential victims is not anomalous.

3. The background and status of the individual asserting the constitutional right may also raise practical considerations relevant to the application of that particular right. In the instant case, as in *Rodriguez*, the victim was an unarmed civilian during peacetime. Application of Fourth and Fifth Amendment rights to such individuals poses significantly fewer complications than does extending constitutional rights to alleged enemy combatants during a time of war. *See Boumediene*, 553 U.S. at 766-67.

While citizenship status can be a relevant factor in applying the *Boumediene* test, it is not always relevant, much less dispositive. As discussed above, where the application of a particular constitutional right to a foreign national is neither anomalous nor impracticable, as in *Boumediene* and here, the victim's lack of "voluntary connections" to the United States poses no barrier to the provision's extraterritorial reach.

In this case, the en banc Fifth Circuit did not consider the full range of relevant factors and considerations because it erroneously applied the wrong standard. The Court might thus benefit from permitting the lower courts to apply the *Boumediene* standard in the first instance in this and other cases.

CONCLUSION

For the reasons above, *amici* respectfully request that the Court find that a *Bivens* remedy is available and hold that the extraterritorial application of the Fourth and Fifth Amendments is governed by the functional approach reaffirmed in *Boumediene*. In that event, we further suggest that a remand for the lower courts to apply the correct standard in the first instance may be appropriate.

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RECORD AND BRIEFS

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JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NATIONAL POLICE ACCOUNTABILITY PROJECT, AND NORTHWEST IMMIGRANT RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

The American Immigration Council (the Council) is a national non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears in federal courts on issues relating to available remedies when immigration officers engage in unlawful and unconstitutional conduct, and undertakes research and advocacy related to the accountability of immigration enforcement agencies and personnel.

The National Immigration Project of the National Lawyers Guild (NIPNLG) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrant rights. Over the last several years, through litigation and advocacy, NIPNLG has worked to promote government accountability for abuse and misconduct by immigration officials against noncitizens and individuals perceived to be noncitizens. To address these issues, NIPNLG represents select victims of immigration abuse and misconduct, appears as amicus curiae before federal courts, provides technical assistance, issues practice advisories, and conducts continuing legal education seminars. NIPNLG has a

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[1] All parties have consented to the filing of all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

direct interest in ensuring that noncitizens are not unduly prevented from pursuing remedial suits in response to unconstitutional action by federal immigration officers.

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law enforcement and corrections officers by coordinating and assisting civil rights lawyers. The project presently has more than 550 attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information on issues related to misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability, and appears as amicus curiae in cases, such as this one, that present issues of particular importance for the clients of its lawyers, *i.e.*, clients injured by law enforcement use of force.

The Northwest Immigrant Rights Project (NWIRP) is a Washington State nonprofit organization that promotes justice by defending and advancing the rights of immigrants through direct legal services, systemic advocacy, and community education. NWIRP strives for justice and equity for all persons, regardless of where they were born. With over 35 attorneys and legal workers, NWIRP provides direct representation to low-income immigrants who are placed in removal proceedings and to those who face abuse and mistreatment by immigration officers. NWIRP has

represented numerous victims of unconstitutional acts by border patrol agents and has a direct interest in the outcome of this case.

SUMMARY OF ARGUMENT

This Court's grant of *certiorari* asked the parties to address an additional issue not presented in the petition for *certiorari*: whether *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), provides a cause of action for the claim asserted in this case.

This Court should not hesitate to find a cause of action. Since first doing so in *Bivens* itself, this Court has recognized a cause of action to seek damages for a federal agent's violation of the Fourth Amendment because, as the Court explained, "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Id.* at 397 (quoting *Marbury v. Madison*, 1 (Cranch 137), 163 (1803)). To be sure, the Court has declined to recognize the availability of a *Bivens* cause of action where the plaintiff can avail him- or herself of an alternative remedial scheme established by Congress, or in the presence of "special factors" that point against the recognition of a cause of action. *See, e.g., Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983). But neither of those caveats are present in this case.

Plainly, Petitioners have no recourse to any alternative remedial scheme. In contrast to other cases in which this Court has declined to find a *Bivens* cause of action, here Congress has not enacted any "elaborate, comprehensive scheme ... by which improper action may

be redressed." *Bush v. Lucas*, 462 U.S. 367, 385 (1983). The Immigration and Nationality Act (INA) is not a substitute because it provides no mechanism to deter constitutional violations or compensate victims. To the contrary, the INA confirms that Congress intended to preserve a *Bivens* action in these circumstances. The statute setting forth the powers of immigration officers, 8 U.S.C. § 1357(g)(8), contemplates the availability of such a remedy. Nor can Petitioners find any redress in state court, due to the Westfall Act. *See* 28 U.S.C. § 2679(b)(1); *cf. Minneci v. Pollard*, 565 U.S. 118, 129-30 (2012) (declining to find a *Bivens* cause of action where state-law remedies are available). And this Court previously held that the Federal Tort Claims Act (FTCA) is not a substitute for *Bivens*, either. *Carlson v. Green*, 446 U.S. 14, 20-23 (1980). Thus, absent *Bivens*, Petitioners have no adequate remedy.

Nor are there any "special factors" in this case that counsel against recognizing a *Bivens* cause of action. To the contrary, the context in which this claim arises strongly favors such a cause of action. "The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). The litany of cases involving abusive, unconstitutional conduct by employees of Customs & Border Protection (CBP) and Immigration and Customs Enforcement (ICE) confirm that a *Bivens* remedy is necessary to deter such conduct.

The plenary power that the political branches of government exercise over the admission and exclusion of noncitizens does not compel a different conclusion. In the first place, this case does not involve the admission

or exclusion of noncitizens. It involves an excessive force claim. In any event, where constitutional rights do exist notwithstanding plenary power—as here, for the reasons set forth in Petitioners' brief, *see* Br. 14-27—then the Court should recognize a cause of action that allows a remedy for violation of those rights.

Finally, recognizing a *Bivens* cause of action in this context will not lead to a deluge of new claims. To the contrary, numerous Courts of Appeals have long recognized the availability of a *Bivens* cause of action in the border patrol and immigration enforcement context, and lower courts have not been inundated with litigation as a consequence of this recognition. Nor is there any evidence that legitimate immigration enforcement interests have been unduly constrained as a result. Accordingly, this Court should permit a *Bivens* cause of action in this case.

ARGUMENT

"*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson*, 446 U.S. at 18. When deciding whether to apply *Bivens* to a new context, the Court applies a well-established two-step test. *See, e.g., Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). First, the Court determines whether an "alternative, existing process for protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing" a separate *Bivens* remedy. *Minneci*, 565 U.S. at 122-23 (quoting *Wilkie*, 551 U.S. at 550) (alteration in original). When no such alternative

exists, the Court proceeds to the second step, in which it makes "the kind of remedial determination that is appropriate for a common-law tribunal," albeit one that pays "particular heed" to "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* (quoting *Wilkie*, 551 U.S. at 550).

Applying that test, a *Bivens* cause of action should be available to Petitioners in this case. First, there is no alternative remedial scheme that would provide redress for the violation of Sergio Hernández's Fourth Amendment rights. Second, there are sound reasons to recognize a *Bivens* cause of action in this case, and there are no "special factors" weighing against such recognition.

I. There Is No Alternative Remedial Scheme to Redress Agent Mesa's Violation of Sergio Hernández's Fourth Amendment Rights.

Petitioners' Fourth Amendment claim unquestionably satisfies the first condition: there is no alternative remedial scheme through which Petitioners can seek redress for the violation of Sergio Hernández's Fourth Amendment rights. "For [Petitioners], as for Bivens, it is damages or nothing." *Malesko*, 534 U.S. at 72 (quoting *Davis v. Passman*, 442 U.S. 228, 245 (1979)).

A. There Is No Alternative Remedy Under Federal Law.

First, there is no alternative method under federal law through which Petitioners can receive compensation for Agent Mesa's violation of Sergio Hernández's Fourth Amendment rights. That sets this case apart from a series of cases in which this Court has declined to

recognize a *Bivens* remedy because of the availability of an alternative remedial scheme.

For example, in *Bush*, the Court found that the "elaborate, comprehensive scheme" of civil-service protections and procedures precluded recognition of a *Bivens* cause of action to redress retaliatory firings in violation of the First Amendment. 462 U.S. at 385. That system, the Court found, "provide[d] meaningful remedies for employees" who claimed to have suffered retaliatory action in violation of the First Amendment. *Id.* at 386.

Likewise, in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court declined to recognize a *Bivens* action against government officers who allegedly violated due process in denying claims for Social Security disability benefits. The Court pointed to the "elaborate" administrative structure and procedures, *id.* at 414, that Congress specifically designed to address problems created by the wrongful termination of disability benefits. In devising that system, Congress "chose specific forms and levels of protection for the rights of persons affected by incorrect eligibility determinations...." *Id.* at 426. Given Congress's careful calibration of this remedial scheme, the Court deferred to Congress's judgment as to how best to "mak[e] the inevitable compromises required in the design of a massive and complex welfare benefits program." *Id.* at 429.

The Court reached a similar conclusion in a case involving military discipline. There, too, "Congress ... ha[d] established a comprehensive internal system of justice to regulate military life, taking into account the

special patterns that define the military structure. The resulting system provide[d] for the review and remedy of complaints and grievances such as those presented by" the plaintiffs who sought a *Bivens* cause of action. *Chappell*, 462 U.S. at 302.

No such alternative federal remedial scheme exists in this case. Certainly the INA does not offer any adequate remedy. The INA is a scheme governing the admission, exclusion, and removal of noncitizens. Petitioners' claims have nothing to do with any of these actions. And in any event, nothing in the INA provides for the redress of injuries suffered as a result of constitutional violations, such as the unlawful killing in this case. Nor, as discussed below, do CBP's or ICE's internal disciplinary procedures adequately remedy the unconstitutional abuses of its officers. *See infra* at 16-17.

Indeed, in the INA itself, Congress contemplated the availability of a *Bivens* remedy. In the INA, Congress established a framework for allowing state officers to act as immigration officers, 8 U.S.C. § 1357(g), and sought to give those state officers the same protections from suit that it understood federal immigration officers to enjoy. Thus, it provided that such a state officer "shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law." 8 U.S.C. § 1357(g)(8). The reference to a suit against an "*officer or employee* in a civil action brought under *Federal* ... law," *id.* (emphasis added), is plainly a reference to *Bivens*. A suit under the FTCA is a suit against the

United States, not against an "officer or employee." *Id.* Moreover, in enacting § 1357, Congress was legislating against the backdrop of *Carlson*, 446 U.S. at 19-24, which held that the availability of a remedy under the FTCA does not preclude a *Bivens* action for the same injury. Thus, rather than displacing a *Bivens* cause of action, Congress intended the INA to co-exist with *Bivens*.

B. There Is No Alternative Remedy Under State Law.

There is also no alternative remedy available to Petitioners under state law, in contrast to cases such as *Malesko* and *Minneci*. Under the Westfall Act, 28 U.S.C. § 2679(b)(1), the United States would be substituted as the defendant in any state-law suit against Respondent, and Petitioners would be forced to proceed under the FTCA. 28 U.S.C. §§ 1346(b), 2671 *et seq.* Yet, as noted above, this Court has held that the FTCA is not the kind of alternative remedial scheme that can displace a *Bivens* cause of action. *See Carlson*, 446 U.S. at 20-23. The Court held in *Carlson* that "[p]lainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated [a plaintiff] exclusively to the FTCA remedy." *Id.* at 23.

II. The Context Weighs Strongly in Favor of a *Bivens* Cause of Action.

Because there is no alternative remedy available to Petitioners, this Court should recognize the availability of a *Bivens* cause of action, unless there are "special

factors counselling hesitation." *Minneci*, 565 U.S. at 123 (quoting *Wilkie*, 551 U.S. at 550). There are none here.

A. The "Special Factors" Previously Recognized By This Court Do Not Exist In This Case.

The "special factors" that have led the Court in previous cases to decline to recognize a *Bivens* remedy are not present in this case.

First, the Court has found "special factors" to counsel against a *Bivens* remedy when there is not a judicially manageable standard to adjudicate the alleged constitutional wrong. Thus, in *Wilkie*, the Court declined to recognize a *Bivens* cause of action to seek redress for the government's alleged retaliation against the plaintiff on account of his exercise of his property rights. The Court reasoned that "[a] judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining would be endlessly knotty to work out," and that there would be "serious difficulty [in] devising a workable cause of action." *Wilkie*, 551 U.S. at 562.

That concern does not apply in this case. The standards for adjudicating excessive force claims under the Fourth Amendment are well-understood, and the Court has found no difficulty devising a workable cause of action for suits alleging excessive force. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 394-99 (1989).

Second, the Court has found such "special factors" to exist in the context of military discipline. The Court reasoned that the "military establishment" has a "unique disciplinary structure," *Chappell*, 462 U.S. at 304, and the integrity of that disciplinary structure is necessary for the military to perform its function. The "special

nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." *Id.* at 304. Accordingly, allowing *Bivens* suits would be "inappropriate." *Id.*; *see also United States v. Stanley*, 483 U.S. 669, 683-84 (1987).

The special factors that informed the Court's holding in *Chappell* and *Stanley* are not present in this case, either. Allowing Petitioners to sue under *Bivens* would not interfere with the chain of command in CBP or ICE or undermine the discipline of personnel in those agencies. To the contrary, allowing *Bivens* actions would provide additional incentives for CBP and ICE personnel to follow the rules and procedures intended to foster respect for the constitutional rights of the individuals with whom CBP and ICE officers interact. *See* 8 C.F.R. § 287.8 (setting forth "standard for enforcement activities," including for the use of deadly force).

B. The Context of Border Patrol Is Not a Special Factor Counseling Against a *Bivens* Remedy.

To the extent that Respondent contends that the context of the border region is a special factor counseling against a remedy for constitutional violations by federal officers, that argument is critically flawed. The logic of that position would apply to actions brought by U.S. citizens as well as noncitizens, and would apply to torts committed on either side of the border fence. This Court should not accept an invitation to carve out the border

region as a zone of official immunity in which judicial remedies are unavailable, even for blatant violations of constitutional rights.[2]

Indeed, Congress has a strong national interest in deterring mistreatment of foreign nationals by allowing *Bivens* suits alleging violations of constitutional rights. In *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Court "reaffirmed that 'one of the most important and delicate of all international relationships ... has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.'" *Id.* at 2498-99 (citation omitted). The perceived mistreatment of foreign nationals located in the United States "may lead to harmful reciprocal treatment of American citizens abroad." *Id.* at 2498. The same logic applies with equal force to the actual mistreatment by federal agents of foreign nationals located along international borders. As the Fifth Circuit panel held below, this logic "militates in favor of the availability of some federal remedy for mistreatment at the hands of those who enforce our immigration laws. Where those who allege mistreatment have a right but lack a remedy, as here, the Supreme Court suggests that Congress

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[2] Notably, courts have found that Congress has enacted immigration statutes with extraterritorial application. In *United States v. Villanueva*, 408 F.3d 193 (5th Cir. 2005), the court upheld the conviction of defendants who had attempted to smuggle individuals from El Salvador into the United States. Defendants were arrested in Mexico by Mexican police on Mexican territory. In affirming the convictions, the Fifth Circuit found that 8 U.S.C. § 1324(a)'s prohibition on bringing undocumented individuals to the United States applied to extraterritorial conduct, including conduct occurring exclusively within Mexico. 408 F.3d at 198-200.

would want some remedy to be available." *Hernandez v. United States*, 757 F.3d 249, 276 (5th Cir. 2014), *adhered to in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015).

Moreover, patrolling the border region does not involve any special considerations absent from the ordinary policing context in which *Bivens* actions are well-established. Like police officers, border patrol officers "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. But that reality does not foreclose a *Bivens* remedy. Instead, the law accounts for these circumstances by providing a qualified immunity defense, and potential early dismissal of a civil action, if a reasonable officer could have believed that the officer's conduct was lawful under clearly-established law and reasonable in the totality of the circumstances. The reasonable latitude that law enforcement officers enjoy provides no reason to foreclose a remedy for blatantly illegal conduct.

This Court's recognition that the political branches exercise plenary power over the admission and exclusion of noncitizens, *see Galvan v. Press*, 347 U.S. 522, 530 (1954), also does not counsel against a *Bivens* remedy. This case does not involve the admission or exclusion of noncitizens; it involves an excessive force claim under the Fourth Amendment for the shooting of a teenager.

Moreover, even if plenary power were relevant here, it would only bear on the scope of constitutional rights,[3] and not on the availability of a remedy when those rights are violated. Consequently, in other contexts in which Congress exercises plenary power, Courts of Appeals have not hesitated to allow *Bivens* claims. For example, the Eighth Circuit allowed a *Bivens* claim against a Bureau of Indian Affairs officer to proceed, *Wilkinson v. United States*, 440 F.3d 970, 971 (8th Cir. 2006), even though Congress exercises plenary power over the affairs of Native Americans, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1988). Similarly, a *Bivens* suit against patent officers withstood a claim of absolute immunity in the Fourth Circuit, *Goldstein v. Moatz*, 364 F.3d 205, 211-19 (4th Cir. 2004), even though Congress has plenary power to "to legislate upon the subject of patents," *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843).

Here, for the reasons given by Petitioners, Sergio Hernández had a Fourth Amendment right to not be shot to death, without provocation, by Respondent. *See* Petrs. Br. 14-27. And if that constitutional right is

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[3] While some cases rely on plenary power in shaping the scope of constitutional rights in the immigration context, *see, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 766-70 (1972); *Harisiades v. Shaughnessy*, 342 U.S. 580, 591-92 (1952), this Court has also long recognized that the exercise of plenary power is still "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889) (instructing that plenary power over immigration is restricted in its exercise "by the [C]onstitution itself.").

violated, the victim should have a remedy to obtain both compensation and to deter future unlawful shootings.

C. The Need for Deterrence Supports a *Bivens* Remedy In This Case.

In addition to compensating victims for constitutional wrongs, "[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Malesko*, 534 U.S. at 70; *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter *the officer*."). And the need for deterrence in this context is grave.

Numerous cases catalogue examples of shocking abuse by CBP officers, including not only reckless and fatal shootings like this case, but also cases involving abuses in detention. *See, e.g., Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 620-21 (5th Cir. 2006) (holding that border patrol agent was not entitled to qualified immunity for yelling profanities while repeatedly kicking a handcuffed woman in the back and pushing her against a concrete wall, triggering epileptic seizures); *Perez v. United States*, 103 F. Supp. 3d 1180, 1191 (S.D. Cal. 2015) (describing "the Rocking Policy," whereby border patrol agents deem rock-throwing a sufficient threat to justify lethal use of force by gunfire); *Estate of Hernandez-Rojas ex rel. Hernandez v. United States*, 62 F. Supp. 3d 1169, 1172-73, 1188 (S.D. Cal. 2014) (denying summary judgment motion where plaintiffs presented sufficient evidence that border patrol agents' physical abuse of detained Mexican national—including evidence that the detainee was repeatedly punched, kicked, and stepped on—"[was] a substantial factor in causing [the

detainee's] injuries and death"); *see also* Bob Ortega & Rob O'Dell, *Deadly border agents incidents cloaked in silence*, AZ Republic, Dec. 16, 2013 (reporting border patrol agent's fatal shooting, from the United States' side of the Rio Grande, of Juan Pablo Perez Santillan, who was on the Mexican bank of the river); Jason Buch, *Mexican Girl Clutched Her Dying Father*, San Antonio Express-News, Sept. 8, 2012 (reporting border patrol agent's fatal shooting, from a boat in the Rio Grande, of Guillermo Arevalo Pedraza, who was celebrating a birthday with his wife and two young daughters on the Mexican bank of the river); *More Accounts Emerge Following Deadly Border Shooting*, Nogales Int'l., Jan. 6, 2011 (reporting border patrol agent's fatal shooting, by aiming through the border fence, of 17-year-old Ramses Barron Torres).

American citizens also are affected when CBP and ICE officials are permitted to act with impunity. U.S. citizens have been detained and, in some cases, removed, by immigration officials. *See, e.g.*, *Castillo v. Skwarski*, No. 08-5683, 2009 U.S. Dist. LEXIS 115169 at *2-11, *16 (W.D. Wash. Dec. 10, 2009) (U.S. citizen veteran, detained for over seven months and ordered removed, brought *Bivens* suit); Order, *Guzman v. United States*, No. CV 08-01327 GHK (C.D. Cal. May 11, 2010), ECF No. 80 (American citizen with mental disability who was detained and removed, settled damages suit); Complaint, *Riley v. United States*, No. 00-cv-06225 ILG/CLP (E.D.N.Y. Oct. 17, 2000), ECF No. 1 (*Bivens* and FTCA claims for unlawful detention, shackling and strip search of lawful permanent resident upon return to U.S., settled for monetary damages).

Bivens is critical to deterring such abuse. The absence of a *Bivens* remedy would effectively immunize CBP and ICE officers from adverse consequences for violations of noncitizens' rights. Although these agencies do have internal disciplinary procedures, their internal discipline has been toothless. A study by the American Immigration Council covering 809 complaints of alleged abuse lodged against border patrol agents between January 2009 and January 2012 revealed that, in an astonishing 97% of cases resulting in a formal decision, no action was taken. Over 75% of these cases involved allegations of physical abuse or excessive force. *See* American Immigration Council, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse* 8 (2014), http://tinyurl.com/z9ay4k9. And it is likely that the vast majority of cases go unreported: victims and their families—many of whom are without formal education, face language barriers, or lack legal sophistication—are not well-positioned to ensure that these internal processes are effective at guarding the guardians.

D. Recognizing a *Bivens* Cause of Action Would Not Result in a Deluge of New Litigation.

Finally, recognizing a *Bivens* cause of action in this case would not open the floodgates to a new type of *Bivens* claim. Several Courts of Appeals already have recognized the availability of a *Bivens* cause of action in the border patrol and immigration enforcement context. *See, e.g., Martinez-Aguero*, 459 F.3d at 625 (involving false arrest and excessive force against Mexican woman near U.S. port of entry); *Franco-de Jerez v. Burgos*, 876 F.2d 1038, 1039, 1042-43 (1st Cir. 1989) (allowing case to

proceed to discovery against immigration officer on *Bivens* claim where noncitizen was held incommunicado for over ten days); *Ysasi v. Rivkind*, 856 F.2d 1520, 1528 (Fed. Cir. 1988) (vacating grant of summary judgment in favor of border patrol agents in *Bivens* action based, in part, on lack of showing that alternative remedies were available and equally effective); *Jasinski v. Adams*, 781 F.2d 843, 845-46 (11th Cir. 1986) (affirming denial of summary judgment in *Bivens* challenge to detention and search by immigration officer); *Guerra v. Sutton*, 783 F.2d 1371, 1375-76 (9th Cir. 1986) (vacating and remanding dismissal of *Bivens* claims against border patrol agents on qualified immunity grounds); *Tripati v. U.S. INS*, 784 F.2d 345, 346 n.1 (10th Cir. 1986) (finding civil rights action against immigration officer properly brought under *Bivens*); *accord Ballesteros v. Ashcroft*, 452 F.3d 1153, 1160 (10th Cir. 2006) ("No remedy for the alleged constitutional violations would affect the BIA's final order of removal. Any remedy available to Mr. Ballesteros would lie in a *Bivens* action."), *adhered to in part on reh'g*, 482 F.3d 1205 (10th Cir. 2007); *Matter of Sandoval*, 17 I&N Dec. 70, 82 (BIA 1979) (citing *Bivens* for the proposition that "civil or criminal actions against the individual officer may be available"). In the thirty years since the first of these decisions, there has been no resulting deluge of meritless cases or interference with the government's ability to enforce the immigration laws.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioners' brief, the Court should hold that a *Bivens* cause of action is available to Petitioners.

December 9, 2016

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RECORD AND BRIEF

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JESUS C. HERNANDEZ, et al.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE AMNESTY INTERNATIONAL USA, THE CENTER FOR CONSTITUTIONAL RIGHTS, HUMAN RIGHTS FIRST, AND THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are international human rights organizations that engage in litigation, education, and advocacy to promote respect for and adherence to international human rights law and principles by all nations, including the United States. The Fifth Circuit's decision in this case eschewed the functional approach mandated by this Court in *Boumediene v. Bush*, 553 U.S. 723 (2008) in favor of a rigid, formalistic approach that fixated on the fortuity of the exact location of the victim of the cross-border shooting. Amici Curiae are concerned that the formalistic approach adopted by the Fifth Circuit runs counter to the United States' obligations under international law to provide a remedy for gross violations of human rights, including as in this case, extrajudicial killing, committed by its officials on the U.S.-Mexico border.

More detailed descriptions of the particular mission and interest of each Amicus Curiae are provided in Appendix A.

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[1] The parties have consented to the filing of this brief. In addition to Amici and their counsel, this brief was prepared with the assistance and financial support of Hope Metcalf, Diala Shamas, Brent Rosenthal, and the law firm of Rosenthal Weiner, LLP, Dallas, Texas. No other person or entity made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Petitioners seek compensation for the killing of their son, fifteen-year-old Sergio Hernández, by Jesus Mesa, Jr., a U.S. Customs and Border Patrol agent. But for the fact that Hernández died some feet over the U.S.-Mexico border, there is little question that Mesa's actions would be subject to constitutional scrutiny and Petitioners would be eligible to seek an appropriate remedy. The Fifth Circuit, however, found that his presence on Mexican soil divested Hernández of any rights under the Constitution and absolved Mesa of any responsibility.

In reaching its conclusion, the Fifth Circuit relied on an overly narrow and outdated interpretation of *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1994). That opinion, a plurality, must be read in light of the Court's further articulation in *Boumediene* of the extraterritorial application of constitutional rights. Justice Kennedy, in his concurrence in *Verdugo*, wrote that "we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad." *Id.* at 277. *Boumediene*, authored by Justice Kennedy, held that "extraterritoriality turns on objective factors and practical concerns, not formalism," *id.* at 764, and stated that the appropriate inquiry is whether extraterritorial application of the constitutional provision would be "impractical and anomalous." *Id.* at 760 (quoting *Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring)).

While not strictly binding on the Court, international law and principles of comity are nonetheless instructive as to whether the extraterritorial recognition of constitutional rights would be "impracticable and anomalous." In *Boumediene*, for example, among the many factors leading to the Court's determination that "there are few practical barriers to the running of the writ," *id.* at 770, was the Court's conclusion that "[t]here is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government." *Id.* That decision stands in plain contrast with *Verdugo*, where a critical consideration was the fact that the actions involved Mexican officers within Mexican territory, where there existed no parallel to the Fourth Amendment's warrant requirement and no means to enforce it. *Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring) ("The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.").

In this case, as in *Boumediene*, "there is no indication" that providing a remedy here "would cause friction with the host government." *Boumediene*, 553 U.S. at 770. First, under settled international legal principles, extraterritorial jurisdiction is especially appropriate where, as here, the primary actions occurred on U.S. soil and by U.S. nationals. Second, defendants' conduct constitutes an extrajudicial killing, a *jus cogens*

violation and in plain violation of treaty obligations to which both the United States and Mexico have adhered. Finally, those same treaties obligate the United States to provide a remedy, particularly for gross human rights violations such as extrajudicial killing.

In sum, the Fifth Circuit's reading of *Verdugo* was misplaced; an examination of the very factors of comity present in both *Verdugo* and *Boumediene* lead to the opposite conclusion. Here, a U.S. official stood on U.S. soil and shot across the border and killed a Mexican national. The Mexican courts have proved unable to provide a remedy, as the United States has refused cooperation.[2] Without a remedy before a U.S. court, Petitioners will almost certainly be left without any recourse for the extrajudicial killing of their son, an outcome at odds with international treaty obligations by which both the United States and Mexico have agreed to be bound. Where, as here, the international legal backdrop to U.S.-Mexican relations recognizes both the underlying right to life and the appropriateness of extraterritorial jurisdiction, extension of the U.S. Constitution would be neither impracticable nor

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[2] Mexico requested extradition to pursue criminal charges against Mesa for Hernández's killing, but the United States refused. Marisela O. Lozano & Aaron Bracamontes, *Chihuahua Officials Seek Extradition of Border Agent in the '10 Shooting Death of Teenager*, El Paso Times, May 4, 2012, http://www.elpasotimes.com/ci_20544250/extradition-border-agent-sought; Adam Liptak, *An Agent Shot a Boy Across the U.S. Border: Can His Parents Sue?*, N.Y. Times, Oct. 17, 2016, http://nyti.ms/2eaxeMc.

anomalous. *See Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring).

ARGUMENT

International legal principles, which echo the practical approach employed in *Boumediene*, weigh heavily in favor of the modest extension of extraterritoriality presented by this case.[3] Like *Boumediene*, international tribunals have moved away from formalistic approaches to the application of extraterritorial jurisdiction.[4] The European Court of Human

[3] For a more detailed analysis of the interplay between the Court's extraterritoriality jurisprudence and international law principles and human rights norms, *see* Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE INT'L L. J. 308 (2011).

[4] *The 'Lotus' (France v. Turkey)*, P.C.I.J. (ser. A) No. 10 (1927) ("Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain areas by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."). *See also Bankovic v. Belgium*, App. No. 52207/99, Eur. Ct. H.R. (Dec. 12, 2001) ("While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States. . . ."). Since *Bancovic*, jurisprudence from the European Court of Human Rights has moved decidedly in the direction of a functional analysis, even where the alleged violations occurred in the context

Rights has explained its approach to extraterritoriality as follows:

> A state may be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter States. . . . Accountability in such situations stems from the fact that . . . the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.
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> *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. (2004), ECHR 629, ¶ 71.

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of military operations overseas. *Jaloud v. The Netherlands*, App. No. 47708/08, Eur. Ct. H.R. (2014) (extending jurisdiction under the Convention to Dutch authorities who killed an Iraqi national at a checkpoint); *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. (2004) (setting forth test for extraterritoriality but declining to extend jurisdiction to Turkey's alleged violations in Iraq because there was insufficient "factual basis for holding that, at the relevant time, the victims were within that specific area" where Turkey had effective control); *Ilascu v. Moldova and Russia*, App. No. 48787/99, Eur. Ct. H.R. (2004) (holding that Russian officers violated Article 3's prohibition of torture by arresting complainants on foreign territory and handing them over to foreign authorities despite the knowledge that they would be tortured). For a general overview of the extraterritorial application of the European Convention of Human Rights and other international human rights law instruments, *see* M. Milanović, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (Oxford, Oxford University Press, 2011).

The extraterritoriality principle has been codified into a number of international agreements, which explicitly call for extraterritoriality. For example, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment mandates that "[e]ach State Party shall take such measures as may be necessary to establish its jurisdiction" when the torture was "committed in any territory under its *jurisdiction*" or "[w]hen the alleged offender is a *national* of that State." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, art. 5(b) (adopted Dec. 10, 1984, entered into force Jun. 26, 1987) 1465 U.N.T.S. 112; 'CAT') (emphasis added). Contrast with *id.* at art. 5(1)(c) ("When the victim is a national of that State *if that State considers it appropriate*") (emphasis added).

This evolution is particularly notable as to core human rights obligations, even where the acts and the injuries occurred outside sovereign territory and in the course of military activities. In *Al-Skeini v. United Kingdom*, the surviving family members of Iraqis killed by British soldiers in 2003 brought suit under the European Convention of Human Rights.[5] There, the European Court of Human Rights held that "the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the

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[5] *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. (2001).

deceased and the United Kingdom. . . ." *Id.* at ¶ 149. Or, in the words of Judge Bonello in his concurrence: "Jurisdiction flows not only from the exercise of democratic governance. . . . It also hangs from the mouth of a firearm. In non-combat situations, everyone in the line of fire of a gun is within the authority and control of whoever is wielding it." *Id.* at ¶ 28 (Bonello, J., concurring).

The Inter-American Commission on Human Rights (IACHR) is particularly instructive of extraterritoriality in this matter, given the participation of both the United States and Mexico in the Organization of American States. The Commission has held that "the American Declaration protects the rights of all human beings under a Member State's jurisdiction," which, in turn, means "subject to [a state's] authority and control." Under the Commission's jurisprudence, "control" by a state over a victim is established "usually through the acts of the [state]'s agents abroad." *Coard v. United States*, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99 OEA/Ser.L./V/II.106 doc. 6 rev. (1999).[6] In

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[6] For instances of the Commission's general treatment of extraterritorial state conduct under the terms of its Statute and the American Declaration, *see generally Coard*, at ¶¶ 9-10; Inter-Am. Comm'n H.R., Report on the Situation of Human Rights in Chile, OEA/Ser.L./V/II.66 doc. 17 (1985) (referring to Letelier assassination in Washington, D.C.); Inter-Am. Comm'n H.R., Second Report on the Situation of Human Rights in Suriname, OEA/Ser.L./V/II.66 doc. 21, rev. 1 (1985) (addressing allegations that Surinamese citizens residing in Holland had been harassed and/or attacked by agents of Suriname); *Panamanian Victims v. United States*, Case 10.573, Inter-Am. Comm'n H.R., Report No.

Coard, the Commission examined allegations that U.S. officials had unlawfully detained petitioners during U.S. military operations in Grenada in 1983. The Commission found that the United States' obligations under the American Declaration applied because "the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control." *Id.* at ¶ 37; *see also Alejandre Jr. v. Cuba*, Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L./V/II.106 doc. 6 rev. at ¶ 23 (1999) (finding that Cuba's obligations under the American Declaration extended to four civilians who were killed when Cuban military shot down two civilian aircraft in international airspace).

Here, the "jurisdictional link" is more straightforward than in *Al-Skeini* or *Coard*. Settled bases for prescriptive jurisdiction under the Restatement of Foreign Relations include "conduct that, wholly or in substantial part, takes place *within its territory*" and "the activities, interests, status, or relations *of its nationals* outside as well as within its territory." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402 (1987) [hereinafter RESTATEMENT] (emphasis added). The Restatement lists a multitude of factors relevant to whether the exercise of prescriptive

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31/93 OEA/Ser.L./V/II.85 doc. 9 rev. (1994) at 312 (admitting a case concerning actions of United States forces in Panama).

jurisdiction is "unreasonable" when there are competing ties between states and the underlying activity or person. Among those factors are:

> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place *within the territory*. . . . ;
>
> (b) the connections, such as *nationality*, residence, or economic activity, between the regulating state and the *person principally responsible for the activity to be regulated*. . . . ;
>
> (c) the *character of the activity to be regulated*, the importance of regulation to the regulating state, the extent to which *other states regulate such activities*, and the degree to which the desirability of such regulation is *generally accepted*;
>
> (d) the existence of *justified* expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the *international political, legal*, or economic system;
>
> (f) the extent to which the regulation is *consistent with the traditions of the international system*;
>
> (g) the extent to which another state may have an interest in regulating the activity; and

(h) the *likelihood of conflict* with regulation by another state.

Id. at § 403 (emphasis added).

These factors, while by no means binding on the Court, illuminate *Boumediene*'s functional analysis and overwhelmingly weigh in favor of extraterritoriality in this case. As a preliminary matter, the critical activity – the shooting – happened "within the territory" of the United States, and the "person[s] principally responsible for the activity to be regulated" are U.S. nationals. *Id.* at § 403(a), (b).

Second, there exists no credible conflict between the United States and Mexico over the legality of extrajudicial killing. The right to life is enshrined in the founding documents of international human rights, to which both the United States and Mexico have adhered. Universal Declaration of Human Rights ("UDHR"), adopted Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), art. 3 ("Everyone has the right to life, liberty, and security of person."); International Covenant on Civil and Political Rights ("ICCPR"), art. 6, 999 U.N.T.S. 171 (Dec. 16, 1966). Under the American Declaration of Human Rights, signed by both the United States and Mexico, "[e]very human being has the right to life, liberty and the security of his person." Decl. art. 2; IACHR art. 4 ("No one shall be arbitrarily deprived of his life."). Given the ultimate and irreversible nature of death, "[t]he deprivation of life by the authorities of the State is a matter of utmost

gravity." U.N. Human Rights Comm., General Comment No. 6, ¶ 3, U.N. Doc. HRI/Gen/1 (1982). Thus, extrajudicial killing is one of only a handful of violations that the Restatement defines as *jus cogens* norms. RESTATEMENT § 702 (1987) (listing murder alongside genocide, enforced disappearance, torture, slavery, slave trading, and prolonged arbitrary detention).[7]

Nor is there any genuine conflict over whether the plaintiffs in this case are entitled to a remedy for their son's death. The United States and Mexico have both acceded to the ICCPR, which requires the government to "ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy." ICCPR, art. 2(3). That obligation includes the duty to "provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law."

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[7] Law enforcement officers may use deadly force only as a last resort and where doing so is necessary to protect life. *See* Restatement § 702, comment f (1987) ("It is a violation of international law for a state to kill an individual other than as lawful punishment pursuant to a conviction in accordance with due process of law, or as necessary under exigent circumstances, for example by police officers in line of duty in defense of themselves or other innocent persons, or to prevent serious crime."). *See also* Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, U.N. Doc. A/CONF.144/28/Rev.1 (1990); *McCann and Others v. The United Kingdom*, Eur. Ct. H.R. (ser. A) No. 324 (1995); *Suárez de Guerrero v. Colombia*, U.N. Human Rights Comm'n, Commc'n No. 45/1979 (1982).

Basic Principles and Guidelines on the Right to a Remedy and Reparation, U.N. General Assembly, Resolution 60/47 (Dec. 16, 2005) art. IX, ¶ 15.[8]

The Inter-American human rights system has articulated a more detailed set of requirements. Both the Declaration, which the United States has signed, and the Convention, which the United States has not ratified, provide for a robust right to remedies.[9] The Declaration states that "[e]very person may resort to the

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[8] The term "gross violations of human rights" does not have a set definition under international law, but the U.S. Congress has defined that term in the context of determining when foreign aid must be denied to a given country. For that purpose, "gross violations of internationally recognized human rights" "include[] torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person." 22 U.S.C. § 2304.

[9] As noted above, although the United States is not a party to the Convention, the Commission's jurisprudence nonetheless sets forth the United States' obligations under the Declaration. Under Inter-American jurisprudence, the right to a remedy under the Declaration and the Convention are similar in scope and should be read in tandem. *See Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L./V/II.122 doc. 5 rev. 1 ¶ 174 (2004), at 727, ("The right to judicial protection acknowledged by Article XVIII of the American Declaration is affirmed in similar terms by Article 25 of the American Convention on Human Rights, with regard to which the Inter-American Court of Human Rights has stated.)"; *see also Maria da Penha v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L./V/II.111 doc. 20 rev. ¶ 37 (2001). The Commission's practice has frequently been to apply its Convention jurisprudence to its interpretation of parallel Declaration provisions. *See, e.g.*, Inter-Am. Comm'n H.R.,

courts to ensure respect for his legal rights." The Convention further expounds on the obligations in the Declaration. It provides that:

> "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

To that end, the Convention requires that States "ensure that any person claiming such remedy shall have his rights determined by the competent authority" and "develop the possibilities of judicial remedy." Art. 25. Legal recourse is "ineffective" if it does not "recognize the violation of rights," "protect the applicants in the rights affected," and "provide adequate reparation."[10]

In sum, where, as here, an action concerns a *jus cogens* violation and the international legal backdrop

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Report on Terrorism and Human Rights, OEA/Ser.L./V/II.116 doc. 5 rev. ¶ 50 (2002) (noting that "derogation criteria derived from the American Convention on Human Rights embody the Hemisphere's deliberations on the issue and are properly considered and applied in the context of the Declaration"). Indeed, the Commission has referred to the right to remedy as the "object and purpose" of the American Declaration, following the basic principle that to every right there is a remedy. *See Chad Roger Goodman v. Bahamas*, Case 12.265, Inter-Am. Comm'n H.R., Report No. 78/07, OEA/Ser.L./V/II.130 doc. 22 rev. 1 ¶ 61 (2007).

[10] *The Mayagana (Sumo) Awas Tingni Community Case*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 104 (Aug. 31, 2001).

recognizes the appropriateness of extraterritorial jurisdiction, extension of the U.S. Constitution in this limited circumstance would be neither impracticable nor anomalous. *See Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring).

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court reverse and remand.

Respectfully submitted,

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APPENDIX
(LIST OF AMICI CURIAE)

Amnesty International USA is the largest country section of Amnesty International, a worldwide human rights movement with a presence in over 70 countries and the support of 7 million people throughout the world. Amnesty International works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for compliance with international human rights law and international humanitarian law and standards, and it works to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated.

The Center for Constitutional Rights ("CCR") is a national nonprofit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. In 2002, CCR filed the first *habeas corpus* petitions on behalf of foreign nationals detained by the Executive at the U.S. Naval Station at Guantánamo Bay, Cuba, and served as counsel in *Rasul v. Bush*, 542 U.S. 466 (2004) and *Boumediene v. Bush*, 553 U.S. 723, 769 (2008). CCR has also submitted amicus curiae briefs in cases in this Court concerning domestic and international law standards governing U.S. treatment and detention of foreign nationals and the jurisdiction of U.S. courts to hear claims raising international law violations. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rumsfeld v.*

Padilla, 542 U.S. 426 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

Human Rights First is a nonprofit, nonpartisan international human rights organization based in New York and Washington, D.C. Since 1978, Human Rights First has worked to protect fundamental human rights. It promotes laws and policies that advance universal rights and freedoms and exists to protect and defend the dignity of each individual through respect for human rights and the rule of law.

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its president, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because it is greatly concerned about, and seeks to defend, the safety and security of all individuals, regardless of their nationality, from abuses of power at the hands of the government.

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Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF APA WATCH IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

In *Boumediene v. Bush*, this Court held that the Constitution's extraterritorial application "turn[s] on objective factors and practical concerns," not a "formal sovereignty-based test." 553 U.S. 723, 764 (2008). That holding is consistent with Justice Kennedy's concurrence two decades earlier in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), rejecting four Justices' formalist approach to extraterritorial application of the Fourth Amendment's warrant requirement.

The questions presented are:

1. Does a formalist or functionalist analysis govern the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area patrolled by the United States?

2. May qualified immunity be granted or denied based on facts – such as the victim's legal status – unknown to the officer at the time of the incident?

3. May the claim in this case be asserted under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae APA Watch[1] is a nonprofit association dedicated to ensuring that federal, state, and local agencies act within their substantive authority, consistent with applicable procedural requirements. Judicial review – both in retrospective damages claims as here and for prospective equitable or declaratory relief – enables the public to enforce the substantive limits on governmental authority. Trans-border actions, such as the unfortunate shooting here, pose important questions of precisely *which* country's

[1] *Amicus* files this brief with the consent of all parties, which all have lodged blanket letters of consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

substantive and procedural limits apply to resolving these important issues. For that reason, *amicus* APA Watch has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

The parties are divided – and the record unclear – on what preceded the fatal shooting here. *Compare* Pets.' Br. at 2-4 *with* Fed'l Resp.'s Br. at 3. *Amicus* APA Watch has no idea whether the victim – Sergio Hernandez – was a child playing, involved in criminal activity, or simply caught in crossfire. Nonetheless, this *amicus* brief assumes *arguendo* the plaintiffs' side of the factual story because the Border Agent – Jesus Mesa, Jr. – clearly would prevail if this case were remanded for trial and the evidence bore out his version of the facts. In summary, this brief assumes that, while standing in Texas, Agent Mesa shot Hernandez – a Mexican national not connected to the U.S. – for no reason, while Hernandez was standing in Mexico.

If Hernandez were a U.S. citizen or if he had been standing in the United States, his parent's version of the story would trigger rights under the Fourth and Fifth Amendments of the U.S. Constitution, which of course "shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Although this Court historically tied the Constitution to "the Land" of this Nation and its citizens, *U.S. v. Belmont*, 301 U.S. 324, 332 (1937) ("our Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens"); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) ("the general and almost universal rule is that the character of an act as lawful

or unlawful must be determined wholly by the law of the country where the act is done"), the Court more recently has considered the extraterritorial coverage of constitutional protections. *See, e.g.*, *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990); *Boumediene v. Bush*, 553 U.S. 723, 732 (2008). In addition to plumbing these extraterritorial issues further, this litigation also presents the questions of whether Agent Mesa can assert qualified immunity here and whether the Hernandez family can assert an action under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

SUMMARY OF ARGUMENT

With regard to the first two questions presented – namely, the Constitution's reach and the relevance of whether Agent Mesa knew that Hernandez was not a citizen and thus not protected as such – this Court need not resolve these questions for two reasons. First, this case can and should be resolved as a diversity case under Mexico's substantive law (Section I.C). Significantly, the exclusivity clause in 28 U.S.C. §2679(b)(1) of the Federal Tort Claims Act, 28 U.S.C. §§2671-2680 ("FTCA") does not preclude the use of Mexican law in a diversity action because the *entire* FTCA does not apply here, by its express terms (Section I.B.2). For its part, the *Bivens* analysis encourages courts to consider alternative remedies (Section I.B.1). With regard to both of the first two questions presented, the constitutional-avoidance doctrine therefore argues for this Court not to decide the constitutional questions presented.

In essence, the three questions presented boil down to the final question presented: does a *Bivens*

remedy lie here? Because law enforcement officers such as Agent Mesa would be immune under Mexican law, the plaintiffs cannot pursue a Mexican-law suit under diversity jurisdiction in a Texas court, but the same determination by Mexico to bar such suits is due deference from this Court with regard to creating a *Bivens* action there (Section III.C). By the same token, when another country – say, Canada – allows such suits to go forward under its own laws, those suits also could go forward in U.S. courts as diversity suits under a choice-of-law analysis that implicated Canadian law. Essentially, this Court should defer to the national decisions of the nations that are most directly involved in considering a *Bivens* action.

Significantly, this Court's reliance on federal-question jurisdiction in *Bivens* and its progeny should guide this Court to recognize that the Congresses that enacted our subject-matter-jurisdiction statutes did so under the firm rule that the Constitution did not apply abroad. *See, e.g.*, *Belmont*, 301 U.S. at 332; *United Fruit*, 213 U.S. at 356. Accordingly, those statutes – 28 U.S.C. §§1331, 1332 – should be read as arguing against an extraterritorial Constitution and for using foreign law when appropriate in diversity actions (Section III.A). Finally, the border-control and immigration contexts at issue here require this Court's deference to acts of Congress, over a judicial expansion of the scope of the Constitution (Section III.B).

ARGUMENT

I. THE EXTRATERRITORIAL REACH OF THE CONSTITUTION NEED NOT BE RELEVANT TO CROSS-BORDER TORTS OF FEDERAL OFFICERS.

The first question presented concerns the proper mode for analyzing the extraterritorial application of the Fourth and Fifth Amendments. Because this litigation does not require a response to that question, this Court should not answer it: the plaintiffs can bring a foreign-law claim in U.S. court, which is all the relief to which they are entitled.

A. The canon of constitutional avoidance should lead this Court to assess choice-of-law tests before parsing the scope of the Constitution's coverage.

The petitioners ask this Court to construe arcane tests – formalist versus functional analyses – that appear nowhere on the face of the Constitution, but nonetheless go to the Constitution's substance. Under the doctrine of constitutional avoidance, federal courts first should attempt to resolve the issue without resort to the Constitution. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247, 2258-59 (2013). Here, that resolution easily lies by considering whether plaintiffs have a claim under the law of the jurisdiction in which the decedent suffered injury. In essence, this is simply a diversity-jurisdiction case, 28 U.S.C. §1332,[2] where

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[2] "[I]t is facially apparent that each plaintiff's wrongful death claim satisfies the amount in controversy requirement." *Menendez v. Wal-Mart Stores, Inc.*, 364 F. App'x 62, 67 (5th Cir. 2010).

the choice-of-law analysis tips to using Mexican law to determine whether Agent Mesa is liable to plaintiffs.

In situations – such as detentions at Guantanamo Bay – with no other law to apply because no other sovereign has an interest, *see, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 770-71 (2008), this Court must consider the petition's formalist-vs.-functional divide, *id.* at 764. By contrast, in a standard cross-border tort such as the one presented here, the proper resolution can lie under diversity jurisdiction, as informed by foreign substantive law, limited as needed by our due-process protections.[3]

B. *Bivens* mandates a search for alternate remedies, and FTCA poses no obstacle to basing foreign torts on foreign law.

The three questions presented – *i.e.*, choice-of-law versus constitutional extraterritoriality, immunity, and the availability of a *Bivens* action – are inter-related facets of the same basic inquiry of whether the plaintiffs can sue. Importantly, neither *Bivens* nor the FTCA *precludes* the alternate answer to that core question that *amicus* APA Watch proposes here.

1. *Bivens* requires searching for alternate remedies.

Although *amicus* APA Watch addresses whether a *Bivens* action is available here in Section III, *infra*, one thing is clear: *Bivens* would not *preclude* a cause of action under Mexican substantive law. To the contrary, this Court's *Bivens* analysis asks whether

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[3] As explained in Section III, *infra*, no due-process limitations apply here because Mexican law provides the plaintiffs no rights, and thus there is no *Bivens* remedy.

other forms of relief are available as part of analyzing whether to allow a *Bivens* remedy:

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.

Wilkie v. Robbins, 551 U.S. 537, 550 (2007). Whether it applies or not, *Bivens* itself certainly does not limit a plaintiff's available remedies.

2. FTCA does not preclude searching for alternate remedies.

Although *Minneci v. Pollard*, 565 U.S. 118, 126 (2012), cites the FTCA for the proposition that one "ordinarily cannot bring state-law tort actions against employees of the Federal Government," *id.* (emphasis omitted) (*citing* 28 U.S.C. §§2671, 2679(b)(1)),[4] that proposition does not apply to situations to which the FTCA itself does not apply:

> *The provisions of this chapter ... shall not apply* to—
>
> ...
>
> (k) Any claim arising in a foreign country.

28 U.S.C. §2689(k) (emphasis added). Because FTCA's exclusivity clause is every bit as much a part of "this chapter" (*i.e.*, the FTCA) as FTCA's foreign-country exception, the FTCA's bottom line for claims that arise

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[4] Under 28 U.S.C. §2679(b)(1), the FTCA remedy against the United States "is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim[.]"

in foreign countries is that the *entire* FTCA does not apply. In short, neither FTCA's remedy nor FTCA's exclusivity applies here. That leaves plaintiffs free to resort to alternate legal theories, including the ones outlined here.

Although the inapplicability of FTCA's exclusivity clause is obvious from the plain language of FTCA, the same result would flow from the canon against repeals by implication: "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (alteration in original, interior quotations and citations omitted). Indeed, "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975) (internal quotations omitted). Because the alternate action proposed here existed when Congress enacted the FTCA, this Court should not presume that Congress intended to supplant that remedy *sub silentio*, without replacing it.

C. The plaintiffs could sue Agent Mesa in Texas under Mexico's substantive law.

This Court must perform a difficult balancing act when Congress has neither provided nor precluded a remedy for constitutional injury. *Bush v. Lucas*, 462 U.S. 367, 373 (1983). In this case, however, Congress has provided diversity jurisdiction, 28 U.S.C. §1332, and federal courts can easily determine whether to apply U.S. – *i.e.*, federal or state – law or Mexican law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 709 (2004) (*citing* RESTATEMENT (SECOND) OF TORTS §145). As the

Sosa court explained, however, the states' choice-of-law tests differ, and – whatever the test – can end up picking foreign law. *Id.* Under these circumstances, *amicus* APA Watch respectfully submits that federal courts would benefit from a uniform rule of decision for choice-of-law issues in cross-border cases.

1. In the absence of congressional action, this Court should adopt a rule of decision for choice-of-law issues in cross-border torts.

In *Sosa*, this Court rejected the argument that the FTCA should use a "headquarters rule" in cases where that rule would not result in applying foreign law:

> [T]he result of accepting headquarters analysis for foreign injury cases in which no application of foreign law would ensue would be a scheme of federal jurisdiction that would vary from State to State, benefiting or penalizing plaintiffs accordingly. The idea that Congress would have intended any such jurisdictional variety is *too implausible to drive the analysis* to the point of grafting even a selective headquarters exception onto the foreign country exception itself.

Sosa, 542 U.S. at 711-12 (emphasis added). At least until Congress acts to set its own rule of decision in such cases, this Court should not allow this Nation's outward-facing legal system *vis-à-vis* other nations to hinge on the vagaries of state-by-state choice-of-law rules.

Notwithstanding that "when there is little need for a nationally uniform body of law, state law may be

incorporated as the federal rule of decision," *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); *accord Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691-92 (2006) ("prudent course ... is often to adopt the ready-made body of state law as the federal rule of decision until Congress strikes a different accommodation") (internal quotation omitted), such inconsistencies are – per *Sosa*, *supra* – simply "too implausible to drive the analysis" here. Instead, "[a] single nationwide rule would be preferable to one turning on state law." *West Virginia v. U.S.*, 479 U.S. 305, 309 (1987). Without any applicable congressional action, this Court should apply the Restatement test.

2. This Court should apply Mexican law to evaluating plaintiffs' claims.

Under the Restatement test proposed above and adopted by the vast majority of states, *Sosa*, 542 U.S. at 751 (Ginsburg, J., concurring in part and concurring in the judgment), choice of law depends not only on where the parties live, where the tort takes place, and where the injury is felt, but also on which jurisdiction has the most significant relationship to the occurrence and the parties. *Compare* RESTATEMENT (SECOND) OF TORTS §145(2)(a)-(c) *with id.* §145(1). The relationships between the shooting and Mexico versus the United States depends in large part on which set of facts – Agent Mesa's or the plaintiffs' – is accurate. Because Agent Mesa would be held liable only if the plaintiffs proved their rouge-agent theory (*i.e.*, if Agent Mesa's actions were reasonable, liability clearly would not attach), *amicus* APA Watch thus assumes *arguendo* that the plaintiffs will establish their set of facts in order to evaluate liability under

the facts most favorable to plaintiffs. *Land v. Dollar*, 330 U.S. 731, 735 (1947) (merits and threshold issues that "intertwine" can be handled together). Under the plaintiffs' set of facts, Mexico clearly has the greater interest in an unjustified shooting of a Mexican citizen standing in Mexico.

Amici Mexican jurists, practitioners, and scholars explain Mexican law in cases like this, where a victim or the victim's estate has a right to reparations based on a criminal act. Jurists' Br. at 4-5. Either a criminal court or a civil court can resolve reparations, either as part of the criminal trial or as an independent civil action. *Id.* at 5-9. Significantly, however, both types of Mexican court would act only over someone within their jurisdiction or, in the case of the civil courts, one domiciled there. *Id.* That said, nothing would preclude a U.S. district court sitting in diversity jurisdiction from applying substantive Mexican law as described by *amici* jurists, practitioners, and scholars.

II. AGENT MESA'S KNOWLEDGE OF HERNANDEZ'S CITIZENSHIP HAS NO BEARING ON IMMUNITY UNDER MEXICAN LAW.

The second question presented asks whether the availability of qualified immunity can hinge on facts – such as the victim's citizenship – that were unknown to the officer at the time of the incident. Specifically, the victim here could have been a U.S. citizen and thus protected by the U.S. Constitution both at home and abroad; if so, the plaintiffs could sue Agent Mesa under *Bivens* for violating the victim's constitutional rights, without the formalist-vs.-functionalist inquiry into the Constitution's extraterritorial reach. Under

this argument, immunity should not hinge on issues – *e.g.*, citizenship – unknown to the officer when he acted. Pets.' Br. at 27-33. While relevant to liability *under U.S. law*, this inquiry is irrelevant to liability *under the foreign law* of the jurisdiction where the tort occurred. If it accepts this analytical rationale, this Court will not need to resolve this constitutional issue, either, *see* Section I.A, *supra*, which effectively makes the entire case hinge on the *Bivens* question in Section III, *infra*.

While it is an interesting question under U.S. law whether a victim standing in Mexico possibly might hold U.S. citizenship (and so also hold constitutional protection vis-à-vis U.S. officers), it is not a question that this Court need answer. Whatever the victim's citizenship, he would be protected by the law of the jurisdiction in which the shooting occurred (*i.e.*, Mexico). Even if a shooter did not know the laws of Mexico, ignorance of the law would be no excuse; it is enough to fire knowingly into another jurisdiction, without regard for what the laws might be in the other jurisdiction.

While the unknown-citizenship issue is relevant to a qualified-immunity analysis under U.S. law, it simply disappears when this Court considers the case under Mexican law: "if it is not necessary to decide more, it is necessary not to decide more." *Citizens United v. FEC*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) (internal quotations omitted); *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (same). Given the constitutional overlay here, the duty to avoid deciding the question is all the more

pressing. *See* Section I.A, *supra*. Accordingly, *amicus* APA Watch respectfully submits that this Court need not decide the second question presented.

Quite simply, Agent Mesa shot someone standing in Mexico, and he could face the consequences of that action under Mexican law, regardless of what he knew or did not know.[5] "We have long recognized ... that ignorance of the law will not excuse any person, either civilly or criminally." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 581 (2010) (interior quotations omitted). Because "'I thought it was legal' is no defense," *Commil USA, LLC v. Cisco Sys.*, 135 S.Ct. 1920, 1930 (2015), we can assume liability *arguendo* under Mexican law without resolving the trickier qualified-immunity issue under U.S. law. At that point, the real question presented – namely, can plaintiffs sue? – boils down to the related issues of immunity or the viability of a *Bivens* action.[6]

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[5] Of course, if Agent Mesa's use of deadly force was justified under U.S. law – or international law or Mexican law – because the victim was engaged in drug smuggling or other illegal border actions, that could absolve Agent Mesa. The point here is analyze the case *arguendo* under the plaintiffs' allegations.

[6] Although *amicus* APA Watch would argue that foreign-law-based liability should hinge on foreign-law-based immunity, this Court can reach the same result by considering foreign immunity issues in connection with the *Bivens* issue in Section III.C, *infra*.

III. THE AVAILABILITY OF A *BIVENS*-STYLE ACTION FOR CROSS-BORDER TORTS HINGES ON WHETHER A PLAINTIFF CAN SUE FEDERAL OFFICERS UNDER FOREIGN LAW FOR ANALOGOUS TORTS.

As framed in the questions presented, the third and final inquiry is whether the plaintiffs can bring a *Bivens* claim (*i.e.*, whether the plaintiffs have a cause of action against Agent Mesa for violating the Fourth and Fifth Amendments, with no qualified immunity to protect him). As *amicus* APA Watch would frame it, the Court must engage in a *Bivens*-like immunity analysis to see whether the plaintiffs can bring a tort action under Mexican substantive law in a U.S. court (*i.e.*, neither the U.S. Constitution nor qualified immunity would be relevant here). Under either framing analysis, the dispositive question boils down to *Bivens*.

Both because this Court can read the federal subject-matter jurisdictional statutes to preclude an extraterritorial application of the Constitution and because Congress has allowed enforcement of foreign substantive law in our federal courts, the first "special factors counselling hesitation" are the jurisdictional statutes themselves. 28 U.S.C. §§1331, 1332. Second, the border-control or immigration-control nexus in which Agent Mesa operated provides another factor that counsels this Court to stay its hand, as it has in the military context. Finally, the fact that Mexico – the foreign country at issue here – has immunized the type of officers involved here from its civil-liability laws requires this Court to stay its hand, lest it create

operational dangers for federal officers operating with Mexican officials in Mexico.

A. This Court lacks implicit congressional authorization from the subject-matter jurisdiction statutes.

This Court's *Bivens* process relies in part on the need for a federal remedy, given the federal courts' subject-matter jurisdiction over federal questions. *Schweiker v. Chilicky*, 487 U.S. 412, 420-21 (1988); *Bivens*, 403 U.S. at 398-99 (Harlan, J., concurring in the judgment). When Congress first created federal-question in 1875, the Constitution did not apply extra-territorially, *Belmont*, 301 U.S. at 332; *United Fruit*, 213 U.S. at 356, which lends a restricting interpretation on the federal-question statute that Congress enacted: "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957); *accord Nat'l Ass'n of Home Builders*, 551 U.S. at 662. Quite simply, §1331 as enacted does not support extraterritoriality, and §1332 authorizes federal courts to import foreign law for foreign torts, further undermining the need for an extraterritorial Constitution.

This Court previously has accepted prior decisions as limiting the seemingly-broad scope of the subject-matter jurisdiction statutes:

> Whatever Article III may or may not permit, we thus accept the *Barber* dictum as a correct interpretation of the Congressional grant [in 28 U.S.C. §1332].

Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992). A similar reading here should convince this Court that Congress did not authorize this Court's foray into an extraterritorial Constitution. Quite the contrary, for cases like the one here, Congress directed the courts to resolve such cases with diversity jurisdiction and choice-of-law analyses.

B. The border-control and immigration contexts are special factors that weigh against finding *Bivens* liability, at least as to *Bivens* liability that would impose different standards for U.S. officers and their Mexican counterparts.

Although perhaps not as commanding as military affairs – to which this Court has declined to extend a *Bivens* remedy, *see Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *U.S. v. Stanley*, 483 U.S. 669, 681 (1987) – the border-control and immigration contexts at issue here also counsel for this Court to defer to Congress to create rights here. Indeed, this Court's actions to extend constitutional remedies here might harm U.S. officers' ability to work cooperatively with Mexican counterparts in law enforcement on border issues. If the community there realizes that Mexican officers are immune, while U.S. officers are not, focus and fire will be directed to U.S. officers.

Finally, if cases like these are resolved as damage actions under foreign law, courts will not be setting a constitutional norm with each case. Unlike decisions in *Bivens* suits, damage judgments under Mexican law will not – or at least *need not* – constrict border-control policy prerogatives.

C. Courts must import foreign immunity law with foreign substantive law.

In addition to advising this Court about the contours of substantive Mexican law for the plaintiffs' claims against Agent Mesa, *see* Section I.C.2, *supra*, *amici* Mexican jurists, practitioners, and scholars also advise this Court that officers like Agent Mesa would be immune from civil liability under Mexican law. *See* Jurists' Br. at 9-11. This Court already has held that Mexican-law suits in Texas-based federal courts must import the exclusions from suit along with the cause of action. *Slater v. Mexican Nat'l R. Co.*, 194 U.S. 120, 126-27 (1904). As the Court put it in *Slater*:

> It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.

Id. at 126. That injustice precludes a choice-of-law selection for foreign law without also importing the foreign law of immunity. Thus, the plaintiffs cannot pursue a foreign-law suit even though the same action by a border agent at the Canadian border might prove liable – assuming *arguendo* that Canada's immunity laws are more favorable to victims – even though no liability lies in the Mexican context.[7]

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[7] This divergence would not be "racist" but rather a reflection of the legal traditions of Mexico and Canada. For example, many Caribbean islands have populations of predominantly African descent, but nonetheless share Canada's legal traditions, owing to their – and our – common colonial history and English law.

Although *Slater* directly resolves only the foreign-suit approach that *amicus* APA Watch has proposed, it also informs the non-viability of the *Bivens* action for U.S. constitutional violations that this Court asked the parties to address. A *Bivens* suit is not a human or international right. While some sovereigns are more generous with relief for governmental injury, others – including Mexico here – are less generous. In a typical case, this Court takes its cues from what Congress has or has not enacted in a field, *see, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 373 (1983). Here, the foreign government with sovereignty over the underlying tort allegations takes the place of Congress with respect to those tort allegations. That should give this Court pause to promulgate new rights, unsettling the rights that those closest to the issue have adopted. In a case – such as a Guantanamo Bay case – without an alternate sovereign's laws to apply, this Court has more leeway to act without intruding on other nations' sovereignty. Here, this Court can – and should – defer to Mexico on immunity.

CONCLUSION

Although this Court need not answer to first two questions presented here, the Court should affirm the dismissal of this action, either on Mexican-law grounds or because a *Bivens* action does not lie here.

January 17, 2017

Respectfully submitted,

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AND
BRIEF

No. 15-118

DEC - 9 2016

OFFICE OF THE CLERK

In The
Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF BORDER ACTION NETWORK, BORDER NETWORK FOR HUMAN RIGHTS, EQUALITY NEW MEXICO, SAN DIEGO IMMIGRANT RIGHTS CONSORTIUM, SOUTHERN BORDER COMMUNITIES COALITION, AND TEXAS CIVIL RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amici are non-profit organizations that advocate for members of the Mexican-American community in Texas and elsewhere in the border region, particularly on border and civil rights-related concerns. Through this work and their interactions with members of the border community, *amici* can provide important input about the ways in which members of the community are affected by the operations of the United States Border Patrol.

Border Action Network was formed in 1999 and is a human rights community organization based in immigrant and border communities throughout Arizona. Border Action Network is unique in that it not only builds the capacity of on-the-ground organizing and leadership within heavily militarized, criminalized, and marginalized immigrant and border communities, but also carries the local lessons from the border directly to policymakers at a state and national level. Border Action Network's ability, through organizing, research, communications, and advocacy, enables it to expose the ineffectiveness, high cost, and inhumanity of border and immigration enforcement, and its dedication to policy change enables Border Action Network

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[1] No counsel for any party authored the brief in whole or in part and no person or entity, other than the *amici*, their members, or their counsel, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a).

to put concrete, winnable solutions on policymakers' tables.

Border Network for Human Rights ("BNHR") was founded in 1998 for the general purpose of facilitating the education, organization, and participation of marginalized border communities to defend and promote human and civil rights, and to work to create political, economic, and social conditions where every human being is equal in dignity and rights. Most of BNHR's strategies and activities are directed to accomplish four general goals: (1) to strengthen the capacity and organization of impacted border and immigrant communities to voice their opinions, concerns, and solutions on issues such as immigration and enforcement; (2) to establish clear mechanisms for border and immigrant communities to engage in permanent dialogues with policymakers and administration at the local, state, regional, and national levels; (3) for these communities to educate policymakers, stakeholders, and the public on the need for a comprehensive review and reaffirmation of our immigration laws; and (4) to work with and encourage policymakers to enact and implement effective oversight and accountability mechanisms for enforcement policies and practices at the border and in the interior.

Equality New Mexico is a non-profit organization that uses advocacy, outreach, education, and community support to improve the lives of LGBTQ New Mexicans and their families. Through its work, Equality New Mexico helps create a reality of equity, full access, and sustainable wellness. Equality New Mexico

believes that the health and wellbeing of LGBTQ New Mexicans is crucial to creating a stronger, more balanced world.

Since 2007, the ***San Diego Immigrant Rights Consortium*** ("SDIRC") has worked to bring together faith, labor, legal, and community leaders to advocate for policies that promote the civil and human rights of immigrants. SDIRC is comprised of over 40 organizations throughout San Diego County who consist of leaders from the immigrant and refugee communities.

Southern Border Communities Coalition ("SBCC") brings together 60 organizations across the border from San Diego, California, to Brownsville, Texas, and advances the common goal of promoting a safe and strong community for border residents. The coalition was formed in March 2011 as a response to a rash of Border Patrol-perpetrated violence against unarmed border residents and has focused on advocating for border enforcement policies and practices that are accountable and fair, respect human dignity and human rights, and prevent the loss of life in the region. SBCC has engaged in advocacy demanding justice for Sergio Adrián Hernández Güereca, Anastasio Hernandez Rojas, and several other victims of violence at the hands of federal immigration enforcement officers.

Texas Civil Rights Project ("TCRP") is a nonprofit organization that uses legal advocacy to defend voting rights, fight institutional discrimination, reform systems of criminal justice, and protect First Amendment values. With over 25 years of experience, TCRP's

efforts focus on representing low-income and otherwise marginalized members of society. TCRP's interest in this case stems from its years-long work on behalf of victims of civil rights violations at the hands of federal agencies, including the United States Border Patrol, particularly out of TCRP's El Paso and Alamo, Texas offices. The outcome of this case will have a direct impact on TCRP's clients and their families.

SUMMARY OF THE ARGUMENT

A United States Border Patrol agent on the U.S. side of the U.S.-Mexico border shot and killed an unarmed teenage boy on the Mexican side. The boy was playing a game with his friends when the agent started shooting. The boy tried to take cover behind a pillar, but the agent shot him in the face, killing him.

Significantly, every operative fact, except the impact of the bullet that caused the child's death, was committed on United States soil: the Border Patrol agent formed the intent; un-holstered his weapon; took aim; placed his finger on the trigger; squeezed the trigger; discharged his weapon; and the bullet left the chamber. Even though all of this happened on United States soil, the District Court held that it did not have jurisdiction over the boy's parents' civil rights suit because the boy, Sergio Adrián Hernández Güereca, was a Mexican citizen who was killed on the Mexican side of the border. A deeply-divided Fifth Circuit Court of Appeals affirmed. If allowed to stand, the import of

the Fifth Circuit's decision is that along the United States-Mexico border, a coin flip will determine whether legal recourse exists. This Court should reverse.

Amici are advocates for the southern border region, which encompasses 2,000 miles of international border along four U.S. states and six Mexican states and extends 62.5 miles inland on either side.[2] *Amici* believe that the implications of this case are best understood with knowledge of the current state of affairs at the United States-Mexico border. Specifically, *amici* write to highlight three points:

First, Sergio's death cannot be viewed in isolation. *Amici* are painfully familiar with other tragedies involving Border Patrol abuses with facts disconcertingly similar to Sergio's. The common thread among these incidents is that the victims and their families are at once the most vulnerable to Border Patrol abuses and the most powerless to stop them. This Court's decision will affect not just Sergio's family, but also other people injured or killed by the Border Patrol along the entire 2,000 mile length of the border.

Second, the Constitution should protect residents on both sides of the southern border because individuals on both sides are subject to the consequences of the constant presence and far-reaching control of the United States Border Patrol, even when those initial

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[2] *Border Region*, United States-Mexico Border Health Commission, http://www.borderhealth.org/border_region.php (last visited Nov. 7, 2016) [hereinafter *Border Health Commission*].

actions occur entirely on the U.S. side of the border. To achieve the United States' goals of sealing the border, the Border Patrol's authority necessarily extends into the gray area just beyond the southern border into Mexico, allowing U.S. agents to monitor and control residents on both sides of the border. Wherever this authority extends, the Constitution should be a check on Border Patrol actions and a shield for Border Patrol victims.

Third, Constitutional protections should not be limited by cartographic borders because such borders are arbitrary and unclear; they are simply legal constructs. Cartographic borders are neither rational nor practical determiners of a person's Constitutional rights.

Amici therefore submit that the Court should consider the realities of the border region when deciding Sergio's case. United States agents should not get a free pass to violate the Constitution so long as their targets happen to be on the other side of the border. Those injured by Border Patrol abuses should be entitled to Fourth and Fifth Amendment protections.

ARGUMENT

I. Border Patrol Injustices Against Mexican and Other Citizens Have Occurred in the Past and Will Continue to Occur – Without Redress – if the Fifth Circuit's Decision Is Allowed to Stand.

Many people of the border region have suffered under the United States Border Patrol's regime. Between January 2010 and March 2016, at least 46 people died as a result of an encounter with the Border Patrol. In addition to the 46 deaths, at least 26 people were seriously injured by Border Patrol agents, including a minor who was punched in the stomach and a pregnant woman who lost her unborn child after being beaten at a border crossing.[3]

Some of the people targeted by the Border Patrol were attempting to cross the border into the U.S.; others, like Sergio, were not. None should have been subject to lethal force wielded by Border Patrol agents who, under the Fifth Circuit's decision, would be immune from liability. Consider the following examples:

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[3] *Border Patrol Abuse Since 2010*, Southern Border Communities Coalition (Mar. 2016), http://southernborder.org/border-patrol-brutality-since-2010/. In addition to her miscarriage, the woman suffered malformations and is disabled as a result of the Border Patrol beating. *Id.*; *see also Deaths and Injuries in CBP Encounters Since January 2010*, American Civil Liberties Union of New Mexico, 24 (May 19, 2016), *available at* https://www.aclu.org/sites/default/files/field_document/may_2016_dead_and_injured_by_cbp_officials.pdf [hereinafter *ACLU Report*].

- **Ramses Barron Torres.** A Border Patrol agent shot and killed Ramses on January 5, 2011. He was 17 years old. Border Patrol agents were chasing drug smugglers on the U.S. side of the border when one agent fired a shot that passed through the metal fence into Mexico and killed Ramses. The Border Patrol agent who fired claimed Ramses and his friends were throwing rocks at him but Ramses' friend, who witnessed his death, stated that the Border Patrol agent's safety had not been threatened in any way.[4] The Border Patrol agent was not criminally charged.[5]

- **Guillermo Arévalo Pedroza.** Border Patrol agents killed Guillermo on September 3, 2012, while he was picnicking at a Mexican riverfront park with his wife and two daughters. A Border Patrol boat on the American side of the Rio Grande River, apparently chasing a young man swimming across the river, opened fire onto the Mexican park and killed Guillermo. The Border Patrol agents later alleged that the people in the park had

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[4] *More Accounts Emerge Following Deadly Border Shooting*, Nogales Int'l (Jan. 6, 2011), http://www.nogalesinternational.com/news/more-accounts-emerge-following-deadly-border-shooting/article_998a4971-2351-5f03-a8f3-c43dd1d65cfe.html.

[5] Rob O'Dell, *7 Times Rock-Throwing Ended in Deadly Force by U.S. Border Patrol Agents*, AZ Central (Oct. 12, 2016), http://www.azcentral.com/story/news/politics/border-issues/2016/10/10/us-border-patrol-rock-throwing-killing-cases/85670112/.

been throwing rocks at them. No criminal charges have been brought against Guillermo's killer.[6]

➔ **José Antonio Elena Rodríguez.** In October 2012, in an incident strikingly similar to Sergio's, a Border Patrol agent shot and killed José when the agent suspected the teen was part of a group throwing rocks.[7] José was on a busy Mexican street 40 feet from the border and carrying only a cell phone.[8] He was shot as many as seven times, with at least eight additional bullets striking an adjacent wall. An autopsy revealed the youth may have been shot in the back or even after he had already fallen to the ground.[9] José's family brought a case similar to this one that is

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[6] Jason Buch, *Mexican Girl Clutched Her Dying Father*, San Antonio Express-News (Sept. 8, 2012), http://www.mysanantonio.com/news/local_news/article/Father-shot-by-border-agent-while-holding-his-3848597.php.

[7] Michael Marizco, *Border Patrol Shootings Going Unresolved*, Fronteras (Oct. 26, 2012), http://www.fronterasdesk.org/news/2012/oct/26/border-patrol-shootings-going-unresolved/.

[8] José was in Nogales, Sonora across from its American counterpart, Nogales, Arizona. Many residents refer to them as a single town of Ambos Nogales meaning Both Nogales. Mark Binelli, *10 Shots Across the Border*, N.Y. Times (Mar. 3, 2016), http://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html.

[9] Michael Marizco, *Autopsy Suggests Boy Shot by Border Patrol Was Already Down*, Fronteras (Feb. 7, 2013), http://www.ronterasdesk.org/content/autopsy-suggests-boy-shot-border-patrol-was-already-down.

currently on appeal to the United States Court of Appeals for the Ninth Circuit.[10]

- **Juan Pablo Perez Santillán.** A Border Patrol agent shot and killed Juan on July 7, 2012.[11] He was standing on the Mexican side of the Rio Grande River acting as a lookout while others swam across. A Border Patrol agent using a long-range rifle with a high-powered scope shot Juan at least five times. The agent claimed to have seen Juan waiving a gun and also reported rock throwing, but Juan was holding only a sweat rag when he died.[12] The agent was not criminally charged.

- **Anastasio Hernandez Rojas.**[13] Border Patrol agents killed Anastasio on May 28, 2010. He was attempting to cross the border to return to his family in San Diego when Border Patrol agents detained him,

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[10] Rob O'Dell, *Supreme Court Vacancy Ripples Through Case Involving Cross-Border Shooting of Teen in Mexico by Border Patrol*, AZ Central (Oct. 24, 2016), http://www.azcentral.com/story/news/politics/border-issues/2016/10/21/court-jose-antonio-elena-rodriguez-cross-border-shooting-teen-mexico-border-patrol/92490696/.

[11] Melissa del Bosque, *Federal Officials Investigate Fatal Border Patrol Shootings*, Texas Observer (June 18, 2015), https://www.texasobserver.org/federal-officials-probe-fatal-border-patrol-shootings/.

[12] O'Dell, *supra* note 5.

[13] The remaining examples are factually different than Sergio's case because they were not cross-border shootings. We include them to bring the Court's attention to the extent of the problem of cross-border violence by Border Patrol agents.

beat him with a baton, and electrocuted him with a Taser. Anastasio informed the agents that he wished to file a complaint, and the agents brought him alone to an isolated area outside the crossing station.[14] The agents later reported that they were then required to subdue Anastasio because he was resisting. However, an amateur video of those events recorded the voice of Anastasio pleading for help; the eyewitness who recorded the video stated that the agents were beating Anastasio while he was lying prone on the ground, handcuffed and not resisting.[15] The autopsy report ruled Anastasio's death a homicide, but the agent was not criminally charged.[16]

➔ **Carlos La Madrid.** A Border Patrol agent shot and killed 19-year-old Carlos near Douglas, Arizona on March 21, 2011. Carlos was driving a car containing marijuana when the Border Patrol agents arrived. He attempted to flee across the border into Mexico, but one of the agents fired three shots, striking him in the back and killing him. Carlos posed no threat to

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[14] Brian Epstein, *Crossing the Line at the Border*, Need to Know (on PBS), 4:40-6:05 (Apr. 20, 2012), *available at* http://www.pbs.org/wnet/need-to-know/security/video-first-look-crossing-the-line/13597/.

[15] *Id.* at 7:46-9:38.

[16] Dave Rice, *50 Murders by the Border Patrol?*, San Diego Reader (Nov. 14, 2016), http://www.sandiegoreader.com/news/2016/nov/14/ticker-50-murders-border-patrol/#.

the Border Patrol at the time he died; early allegations of rock throwing were determined to be unfounded.[17]

- **Alfredo Yanez Reyes.** A Border Patrol agent shot and killed Alfredo on June 21, 2011. Alfredo and another individual were attempting to cross the border near San Diego, California when the Border Patrol spotted them and began a pursuit.[18] As with Ramses, Carlos, and initially with Sergio, the agent who killed Alfredo claimed that he had been forced to shoot because rocks had been thrown at him.[19] However, it is unknown whether any rocks were thrown at all, nor whether Alfredo was the person who threw anything.[20]

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[17] Jonathon Shacat, *Waiting for Answers One Year After Border Shooting*, Douglas Dispatch (Mar. 21, 2012), http://www.douglasdispatch.com/news/waiting-for-answers-one-year-after-border-shooting/article_30e6022e-a49e-5adc-9dcd-2c86a565315c.html.

[18] Reports say that Alfredo climbed a tree before being shot. Kristina Davis, *Border Chief Sued in Rock-Throwing Death*, San Diego Union-Tribune (May 13, 2015), http://www.sandiegouniontribune.com/sdut-border-patrol-chief-fisher-lawsuit-yanez-rocking-2015may13-story.html. The tree was on the Mexican side of the fence but technically on U.S. soil. *Id.*

[19] The ACLU reported that in at least 9 Border Patrol deaths and one serious injury between January 2010 and May 2016, the Border Patrol alleged that rocks had been thrown at them. *ACLU Report*, *supra* note 3, at 25.

[20] R. Stickney, *ACLU Calls for Probe in Border Shooting*, NBC San Diego (June 22, 2011), http://www.nbcsandiego.com/

As these examples illustrate, Sergio's death was far from an isolated tragedy. If recent history tells its tale, Sergio unfortunately will not be the last victim of the Border Patrol's unfettered control over the borderlands. Under the Fifth Circuit's decision, those who come after Sergio will have no Constitutional protections unless they are fortuitous enough to be standing on American soil when American agents kill them. This approach has the absurd result of protecting those who unlawfully enter into the United States while denying rights to law-abiding Mexican citizens standing in their own country.

II. Because Border Residents Are Under the Control of the Border Patrol, They Must Not Be Denied Constitutional Protections.

The tragedies in the borderlands are a product of aggressive American policies aimed at securing the southern border. These policies have sent 17,500 Border Patrol agents to the region, equipping them with guns and the power to effectively control wide swaths of Mexican territory. Sadly, as described above, Sergio's death is but one example. Sergio was killed on Mexican soil in the deep cement culvert of a dried-up river. On paper, the Border Patrol controls only the area at the top of one side of the culvert, but as this case demonstrates, the Border Patrol exerts its power over the entire area. Where the Border Patrol exercises its

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news/local/ACLU-Calls-for-Probe-in-Border-Shooting-124372389.html.

authority, those harmed by that authority should not be left without recourse.

The growing influence of the Border Patrol began in the 1990s when the United States increased its focus on immigration policies. The strategy at the border shifted from apprehending individuals who crossed into the United States without permission to preventing anyone from trying, causing the Border Patrol's focus to extend past the border into Mexican territory.[21] With this strategy of deterrence came a series of aggressive immigration policies such as Operations Gatekeeper, Safeguard, Rio Grande, and Hold the Line.[22]

United States Customs and Border Protection is now the largest law enforcement agency in the country.[23] There are four times as many agents stationed on

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[21] *See A Culture of Cruelty: Abuse and Impunity in Short-Term U.S. Border Patrol Custody*, No More Deaths, 42 (2011), http://forms.nomoredeaths.org/wp-content/uploads/2014/10/CultureOfCruelty-full.compressed.pdf [hereinafter *A Culture of Cruelty*].

The Border Patrol's primary mission is "reducing the likelihood that dangerous people and capabilities enter the United States between the ports of entry." *Border Patrol Overview*, U.S. Customs and Border Protection (Jan. 27, 2015), https://www.cbp.gov/border-security/along-us-borders/overview [hereinafter *Border Patrol Overview*].

[22] *Backgrounder: Southwest Border Security Operations*, National Immigration Forum, 5-7 (Dec. 30, 2010), https://immigrationforum.org/blog/backgrounder-southwest-border-security-operations/ [hereinafter *Backgrounder*].

[23] Andrew Kennis, *Supreme Court to Decide Fate of Case That Challenges Cross-Border Killings by U.S. Agents*, Vice News

the southern border today than there were in 1992.[24] Additionally, state and local law enforcement officers join in, enforcing federal immigration law under the power granted in Section 287 of the Immigration and Nationality Act, codified at 8 U.S.C. § 1357(g).[25] The influx of agents at the southern border and the power they are granted allow the Border Patrol to control the land and people on both sides of the border.

There is little question that the 15 million people who live in the borderlands acutely feel the presence

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(Mar. 30, 2016), https://news.vice.com/article/supreme-court-cross-border-killing-patrol-agent-usa-mexico.

[24] There were 17,522 Border Patrol agents stationed at the southern border as of the 2015 Fiscal Year and only 3,555 in 1992. *Border Patrol Agent Staffing by Fiscal Year*, United States Border Patrol (Sept. 19, 2015), https://www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2015.pdf. The rapid growth of Border Patrol agents has caused quality concerns and led to problems with training and supervision. *See* Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, Politico Magazine (Nov./Dec. 2014), *available at* http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=2.

[25] *See A Culture of Cruelty*, *supra* note 21, at 43. Under the 287(g) program, U.S. Immigration and Customs Enforcement can enter into a joint Memorandum of Agreement with state and local law enforcement to delegate the authority of enforcing federal immigration laws. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/287g (last visited Oct. 26, 2016).

and power of the United States Border Patrol.[26] Interactions with Border Patrol agents are inevitable in the border region. A legal crossing takes an average of 45 minutes; almost 500,000 people legally cross the southern border each day to work, shop, or visit with friends and family.[27] After crossing, border residents are subjected to random checkpoint stops, searches, and interrogations by the Border Patrol.[28] In this context of cross-border life, border residents understand that American border authorities closely monitor their actions.

The Fifth Circuit's decision ignores the realities of the region and cannot be rationally applied. While *amici* recognize that Border Patrol agents have a difficult and important job and that the majority of agents carry out their duties responsibly, the Fifth Circuit's decision upholds a Constitutional loophole that may

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[26] Joshua Breisblatt, *Forum Statement for Record on Fencing, Infrastructure and Technology Border Hearing*, National Immigration Forum, 1 (May 13, 2015), https://immigrationforum.org/blog/forum-statement-for-record-on-fencing-infrastructure-and-technology-border-hearing/.

[27] Waiting times vary among the different crossing stations, ranging from 0 to 90 minutes. *See Best Time to Cross the Border*, Calit2, http://traffic.calit2.net/border/border-crossing-wait-times.php (last visited Oct. 26, 2016). 178,717,453 train passengers, bus passengers, personal vehicle passengers, and pedestrians legally crossed the southern border in 2015. *Border Crossing/Entry Data: Query Detailed Statistics*, Bureau of Transp. Statistics, https://transborder.bts.gov/programs/international/transborder/TBDR_BC/TBDR_BCQ.html (last visited Oct. 31, 2016).

[28] *See Backgrounder*, *supra* note 22; *Border Patrol Overview*, *supra* note 21.

increase the likelihood of future abuse. *Amici* submit that if American policy grants the Border Patrol *de facto* authority over both U.S. and Mexican land, then all citizens within the *de facto* American-controlled area (both American and Mexican) deserve Fourth and Fifth Amendment protections.

III. Cartographic Borders Should Not Signify Where Constitutional Rights End Because They Are Arbitrary.

On a map, the border between the U.S. and Mexico is a sharp black line. The land on one side of that line is one color; the land on the other side is another. Yet the real world is not so clearly defined, so the border cannot be the end-all stopping point for Constitutional protections. In addition to being blurred by the *de facto* control of the U.S. Border Patrol over parts of Mexico, the cartographic border is especially arbitrary at the southern border where culture, policy, and landscape redefine the lines.

Border residents' lives do not fit neatly into one side of the border line or the other, so their location in relation to the border at any given time is not a rational determiner of their Constitutional rights.[29] Many border residents grew up during a time when the

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[29] "While the U.S.-Mexico borderlands resemble border regions in other parts of the world, nowhere else do so many millions of people from two dissimilar nations live in such close proximity and interact with each other so intensely." *Border People*, The University of Arizona Press, http://www.uapress.arizona.edu/Books/bid289.htm (last visited Nov. 7, 2016).

border was more like a bridge than a wall; crossing over for a few hours was an unremarkable part of life. Communities organically sprang up along both sides of the Rio Grande River without much attention paid to the invisible border. Today a steel fence and rigid mindset bisect the lives of borderland residents, but 15 pairs of sister cities such as San Diego-Tijuana and El Paso-Ciudad Juarez still flourish as symbiotic communities.[30] Under the Fifth Circuit's decision, border residents who are part of the same community are treated differently due to an arbitrary, invisible line.

Additionally, cartographic borders should not define where Constitutional protections exist because the United States frequently ignores or redefines its borders to further its immigration policies.[31] Under Section 212 of the Immigration and Nationality Act, 8 U.S.C. § 1182, for example, individuals who cross the border without permission are treated as if they never actually crossed the border, despite standing on, and in

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[30] *See Border Health Commission*, *supra* note 2. Another example is the community spread between Candelaria in Texas and San Antonio del Bravo in Mexico. For generations, families have lived on both sides of the river and "[m]any people in Candelaria view the two towns as one, with a river running through it." Sasha von Oldershausen, *Crossing Over: For Families Living on Both Sides of the U.S.-Mexico Border, Breaching the Divide Is a Way of Life*, Texas Observer (Oct. 10, 2016), https://www.texasobserver.org/candelaria-crossing-over-border/.

[31] *See* Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 Stan. J. C.R. & C.L. 165, 177 (2007) ("[D]ecoupling of legal authority from the geographic borders of the nationstate" extends the state's power "far away from [its] own geographical boundaries").

some cases residing on, United States land.[32] Additionally, the United States creates "polka-dot borders" in places like foreign airports where United States officials can collect information from non-citizens under the US-VISIT program.[33] In a similar vein, the Immigration and Nationality Act allows immigration officers to search ships in foreign ports before they travel to the United States "as though made at the destined port-of-entry in the United States."[34] As these examples illustrate, a cartographic test for Constitutional protection, like the one applied by the Fifth Circuit, makes little sense in the border region.

CONCLUSION

The residents of the border community – American and Mexican citizens alike, regardless of which side of the border they are located on – deserve certain basic Constitutional protections. The fortuity of where an aggressor and victim happen to find themselves

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[32] *See id.* at 171.

[33] *See id.* at 174-75; *see also Notice to Nonimmigrant Aliens Subject to Be Enrolled in the United States Visitor and Immigrant Status Indicator Technology System*, Department of Homeland Security, 69 Fed. Reg. 482, 482 (Jan. 5, 2004), *available at* https://www.dhs.gov/xlibrary/assets/usvisit/USVisitnotice1-5-04.pdf; *see also* Philip Mayor, Note, *Borderline Constitutionalism: Reconstructing and Deconstructing Judicial Justifications for Constitutional Distortion in the Border Region*, 46 Harv. C.R.-C.L. L. Rev. 647, 668 (2011) (using the term "polka-dot borders").

[34] 8 C.F.R. § 235.5(b) (2006); *see also* Shachar, *supra* note 31, at 176.

with respect to an invisible and arbitrary line should not determine whether the victim's Constitutional rights are protected.

Respectfully submitted,

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Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* BORDER SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are some of the country's foremost scholars on issues touching the United States-Mexico border, including transborder populations, binationalism in cultural identity, immigration and migration, asylum and detention, human rights, drug-related violence, political and cultural geography, environment and sustainability, and border economies. *Amici* are interested in providing the Court an accurate portrayal of the United States-Mexico border as it exists in El Paso-Juárez and other communities through which it runs. Identities of *amici* are described in the Appendix.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), counsel for *amici curiae* states that all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT AND INTRODUCTION

Sergio Adrián Hernández Güereca was shot and killed on the U.S.-Mexico border where it runs through Paso del Norte—a single metropolitan area made up of the twin cities of El Paso and Ciudad Juárez. Though it extends into two countries, Paso del Norte is one community. People here, both Mexicans and Americans, are constantly going from one end of town to the other, many of them doing so every day, even though they cross an international border in the process. They cross because they work jobs on both sides; they cross because their families live on both sides; they cross because they buy goods and services from businesses on both sides.

The killing in the center of this community has presented the Court with important questions of law. *Amici* here speak to two of them. First, what factors determine the extraterritorial reach of the Fourth Amendment's bar against unreasonable seizure of a person's life? In past analysis of the Constitution's extraterritoriality, this Court has taken into account "objective factors and practical considerations," including the nature of the place where an alleged deprivation has occurred, not just the *de jure* sovereignty of that place.[2] Second, can a public officer obtain qualified immunity based on facts that were unknown to the officer at the time of the alleged misconduct? This Court has previously held that the "relevant question" for determining the applicability

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[2] *Boumediene v. Bush*, 553 U.S. 723, 764, 766 (2008).

of qualified immunity is "whether a reasonable officer could have believed [the conduct at issue] to be lawful, in light of clearly established law and the information the . . . officers possessed."[3]

Amici submit this brief about the kind of community where this killing occurred in order to aid the Court's consideration of these questions in three ways. First, as the Court has done in prior extraterritoriality cases, this brief addresses the nature of the place of the alleged deprivation: here, a shared border community where citizens of two countries live, work, and play together. Their interactions and collaborations go on in the midst of the border and the border guards. Second and relatedly, the brief describes basic facts that would be known to a border agent working and firing a weapon within a community like Paso del Norte. Though the agent here did not know Hernández's nationality when he killed him, the agent would have known that American citizens—and many others with strong voluntary ties to this country—are often on the Mexican side of the border in Paso del Norte. *Amici* urge the Court to consider the effect that qualified immunity may have on the behavior of other officers with similar knowledge about the border communities where they work.

Third and most broadly, *amici* intend this brief to help the Court to understand the practical impact of the decision in this case, and especially to recognize the people that it will affect. Many who are not familiar with the border region harbor misconceptions

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[3] *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

about it, including that it is a barren desert and rife with criminal activity. But in fact, if the border agent prevails in this case, the areas in the line of fire include neighborhoods full of schoolchildren and families, and market streets crowded with shopkeepers and tourists.

Paso del Norte is not unique in this regard. All along the border, which nearly 500,000 people cross *every day* in both directions[4], binational communities "function as unified entities despite the division imposed by the international boundary."[5] From San Diego-Tijuana in the West to Brownsville-Matamoros by the Gulf of Mexico, these cross-border twin-city sets are bound together by family ties, economic interdependence, and mutual support. The Court's decision in this case is likely to have powerful effects on them all.

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[4] U.S. DEP'T OF TRANSP., BORDER CROSSING/ENTRY DATA: QUERY DETAILED STATISTICS, https://transborder.bts.gov/programs/international/transborder/TBDR_BC/TBDR_BCQ.html (last visited Dec. 6, 2016).

[5] OSCAR J. MARTINEZ, BORDER PEOPLE: LIFE AND SOCIETY IN THE U.S.-MEXICO BORDERLANDS 12 (1994).

Figure 1. Cross-border communities, each comprising two twin cities, are found along the full length of the U.S.-Mexico border. MICHAEL DEAR, WHY WALLS WON'T WORK: REPAIRING THE US-MEXICO DIVIDE **(2015) (map by Dreamline Cartography).**

ARGUMENT

In the transborder communities along the U.S.-Mexico divide, life on one side is not neatly cut off from life on the other. A person who walks along the border in one of these cities walks through the middle of a single bustling community where the fence marking the border is absorbed as just another fixture in city life.

Residents in these twinned cities interact with the border every day in routine and unremarkable ways. They commute across by the thousands each morning and evening. In 2015, some 41 million people crossed on foot, in addition to roughly 138 million as vehicle

Figure 2. The rooftops of El Paso blend almost imperceptibly into those of Ciudad Juárez. Dennis Tangney, Jr., GETTY IMAGES (Oct. 9, 2013).

passengers.[6] They sit through the checkpoint traffic jams of spring break and *Semana Santa*, the Holy Week before Easter. They cross to go to the doctor's or to the shopping mall. The families living here in two countries but one community, the people drawn here by economic opportunities, tourists exploring the area's binational culture—all of them touch the border.[7] Understanding how the border affects people

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[6] U.S. DEP'T OF TRANSP., BORDER CROSSING/ENTRY DATA: QUERY DETAILED STATISTICS, https://transborder.bts.gov/programs/international/transborder/TBDR_BC/TBDR_BCQ.html (last visited Dec. 6, 2016).

[7] *See* LAURA VELASCO ORTIZ & OSCAR F. CONTRERAS, MEXICAN VOICES OF THE BORDER REGION ix (2011) ("The internationality and intense cross-border interaction of the border region have, more than any other factors, given it a unique personality and flavor. As a consequence, some argue, the borderlands in their

who live with it, and people who grow up alongside it, is essential to understanding the facts of this case and of the future cases that will be controlled by the decision here.

I. U.S. and Mexican residents of the border region live their lives crossing between two countries and intermingling with people from both sides.

The culture of Paso del Norte has evolved through centuries of influences from both Mexico and the United States.[8] In Juárez today, one can turn off of Avenida Benjamín Franklin, past the thirteen-foot statue of Abraham Lincoln, onto the street that bears his name, continuing north into Texas. A few minutes later, the same person can be driving along El Paso's Porfirio Díaz Street, named for Mexico's former president.[9]

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entirety constitute a single transnational system in which human experiences become defined by ties to the other side.") (quotation marks and citation omitted); LAWRENCE A. HERZOG, FROM AZTEC TO HIGH TECH: ARCHITECTURE AND LANDSCAPE ACROSS THE MEXICO-UNITED STATES BORDER 9 (1999) ("Whereas writers have spoken of border cities as 'twins,' the reality is that the 'twin cities' are gradually blending into single transcultural spaces . . . .").

[8] MARTINEZ, *supra* note 5 at 53 ("Above all, the distinctiveness of border Mexicans and Anglos is embedded in the long-term incorporation of many traits from each other's culture, including cross-borrowing of such things as language, religion, values, customs, traditions, holidays, foods, clothing, and architecture.").

[9] SUSAN J. RIPPBERGER & KATHLEEN A. STAUDT, PLEDGING ALLEGIANCE 3-4 (2003).

Like the streets they travel, the lives of people in Paso del Norte are built on the connections that bind the two sides together, not on the fact of the border.[10] The same is true all along the U.S.-Mexico border where many families straddle both sides.[11]

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[10] In a recent poll, residents from both U.S. and Mexican border cities described "a sense of community and dependency between sister cities across the border." On the Mexican side, 69 percent of residents polled reported that they depend on their neighbor across the border for economic survival. On the U.S. side, the number was 79 percent. Alfredo Corchado, *Common ground: Poll finds U.S.-Mexico border residents overwhelmingly value mobility, oppose wall*, THE DALLAS MORNING NEWS (July 18, 2016), http://interactives.dallasnews.com/2016/border-poll/; Michael Dear, *Whose Borderland? What Evidence? Divergent Interests Concerning the Impact of the US-Mexico Border Wall*, *in* A WORLD OF WALLS (Randall H. McGuire & Laura McAtackney eds., forthcoming 2017) (manuscript at 9) (on file with counsel) ("Today, three-quarters of those polled on both sides recognized their economic codependency with the other side. Overwhelmingly they profess to like their neighbors across the line, and they cross frequently to visit family, shop, work, get a haircut or dental care, and attend school.").

[11] Raquel R. Márquez & Harriett D. Romo, *Introduction*, *in* TRANSFORMATIONS OF *LA FAMILIA* ON THE U.S.-MEXICO BORDER 1-2 (Raquel R. Márquez & Harriett D. Romo eds., 2008) (describing the many families living on both sides of the U.S.-Mexico border who are "economically, socially, and emotionally 'transnational'"); RIPPBERGER & STAUDT, *supra* note 9 at xii ("The necessity of speaking both languages is a requirement that emerges from the daily commerce and trade, frequent work crossings, and cross-border familial and social relations that are omnipresent."); *see also* CARLOS G. VELEZ-IBANEZ, BORDER VISIONS: MEXICAN CULTURES OF THE SOUTHWEST UNITED STATES 3 (1996) ("I was born *con un pie en cada lado*; that is, born with

One example of the transborder existence so common in this region is the family of J.A. Rodriguez, the victim of another cross-border shooting by a U.S. border guard in a case currently before the Ninth Circuit.[12] J.A. and his mother lived in Nogales, Sonora, four blocks from the U.S. border.[13] But while J.A.'s mother was at work, J.A.'s grandmother played a major role in raising him.[14] To care for him, she traveled frequently to Sonora from Arizona where she and J.A.'s grandfather live, now both as U.S. citizens.[15]

The border region is full of similar stories. Gloria Sandoval Caples, a Mexican elementary school teacher, first met her American husband while on a shopping trip in the U.S.[16] Their relationship began to grow with several friendly encounters on the U.S.

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one foot on each side of the political border between Mexico and the United States.").

12 *See Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015), *appeal docketed*, No. 15-16410 (9th Cir. July 15, 2015). The plaintiff in *Rodriguez* alleges that, in 2012, a U.S. Border Patrol agent, standing at the edge of Arizona, shot and killed J.A., who was on the Mexican side, walking along one of the main streets of Nogales. *Id.* at 1028-29. The Ninth Circuit panel hearing the appeal in *Rodriguez* has deferred submission pending the Court's decision in this case. *See* Oral Argument at 37:10, *Rodriguez v. Swartz*, No. 15-16410 (9th Cir. Oct. 21, 2016).

13 *Rodriguez*, 111 F. Supp. 3d at 1029.

14 *Id.*

15 *Id.*

16 MARTINEZ, *supra* note 5 at 108-10.

side and one day when he walked Gloria home to Mexico to help her and her mother with some home repairs.[17] The couple eventually married and established their home in El Paso, with Gloria commuting daily across the border to her teaching job in Mexico.[18] Later, Gloria's mother, like J.A.'s grandmother, helped care for their children at her home in Mexico.[19]

Roberto Carrasco's life has little in common with Gloria's, but he too touched the border daily. An American citizen, Roberto attended elementary school in Mexico but high school, college, and graduate school in the United States.[20] He served in the U.S. Navy, which took him abroad, but he spent most of his life on the U.S.-Mexico border.[21] He commuted from his home in Juárez to work as a professor at The University of Texas at El Paso (UTEP), and would travel with his family into the U.S. for movie nights or for longer trips to mountain ranges and beach towns.[22]

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17 *Id.* at 109.

18 *Id.*; email from Oscar J. Martinez, Regents Professor of History, University of Arizona, to Courtney J. Chin (Nov. 15, 2016, 19:29 PST) (on file with counsel).

19 MARTINEZ, *supra* note 5 at 109.

20 *Id.* at 86.

21 *Id.* at 87.

22 *Id.* at 86-87; email from Oscar J. Martinez, *supra* note 18.

Figure 3. A woman, who declined to give her name, is hugged by her husband as they chat through the border fence separating Nogales, Arizona and Nogales, Mexico on July 28, 2010. Jae C. Hong, THE ATLANTIC (May 6, 2013), http://www.theatlantic.com/photo/2013/05/on-the-border/100510/#img36.

Even the people in this region who never cross the border are in constant contact with people from the other side. At UTEP, for example, the student body includes U.S. residents as well as hundreds of students who commute across the border to attend their classes.[23] Eligible Mexican students pay the

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23 Email from Christian Corrales, Student Affairs Official, The University of Texas at El Paso, to Dr. Josiah Heyman (Nov. 3, 2016, 14:48 MST) (on file with counsel); Nestor Rodriguez & Jacqueline Hagan, *Transborder Community Relations at the U.S.-Mexico Border*, *in* CAUGHT IN THE MIDDLE 103 (Demetrios G. Papademetriou & Deborah Waller Meyers eds., 2001) ("Mexican students, many commuting daily from Ciudad Juárez, account

same tuition as in-state students, illustrating the indivisibility of the Paso del Norte community.[24]

The sense of unity in these twin-city pairs is further borne out in joint celebrations of cultural events and in the classrooms of American and Mexican schoolchildren. In Paso del Norte, runners compete in an annual race, the Run International U.S.-Mexico 10K, which begins in El Paso, crosses the Stanton Street Bridge into downtown Juárez, and then turns back to a finish line at the summit of the Paso del Norte Bridge (the bridge beside which Sergio Hernández was killed).[25] Celebrations with music and dancing for the Mexican holiday *el Día de los Muertos*, or Day of the Dead, span several days and both sides of the border.[26] And these communities

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for about 8 percent of the enrollment at [UTEP]."); *see also Border Commuters*, THE UNIVERSITY OF TEXAS AT EL PASO, http://sa.utep.edu/oip/new-students/admissions-information/border-commuters/ (last visited Dec. 6, 2016) (discussing the different types of visa options for border commuter students).

[24] Andrew Rice, *Life on the Line*, N.Y. TIMES, July 28, 2011 (Magazine), at MM20, *available at* http://www.nytimes.com/2011/07/31/magazine/life-on-the-line-between-el-paso-and-juarez.html.

[25] *See* Rudy Gutierrez, *Run International U.S. Mexico 10K run*, EL PASO TIMES, http://www.elpasotimes.com/picture-gallery/news/2016/08/06/run-international-us-mexico-10k-run/88339584/ (last visited Dec. 6, 2016).

[26] *See, e.g.*, *Dia de los Muertos*, SAN DIEGO, https://www.sandiego.org/campaigns/fall-in-san-diego/dia-de-los-muertos.aspx (last visited Dec. 6, 2016); *Things To Do*, VISIT EL PASO, http://www.visitelpaso.com/places/dia-de-los-muertos (last visited Dec. 6, 2016).

mourn together. When Mexican singer Juan Gabriel passed away in August 2016, parallel celebrations of his life occurred on both sides of the border in Paso del Norte, and the cities passed his ashes across so that bishops of both Juárez and El Paso could commemorate his life and work.[27]

In schoolrooms on both the U.S. and Mexican sides of the border region, many thousands of students enroll in bilingual education programs.[28] In El Paso, where some children walk across the border daily to attend class, teachers report higher absenteeism on Mexican national holidays, as well as students who showed up an hour early before Juárez matched its time to daylight savings in the United States.[29] Meanwhile, some parents in El Paso who want their children to be fully bilingual send their children to academically rigorous private schools in Juárez.[30]

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27 *See* María Teresa Vázquez Castillo, *Juan Gabriel and the Taking Back of Downtown Ciudad Juárez*, FRONTERA NORTESUR (Sept. 21, 2016), https://fnsnews.nmsu.edu/juan-gabriel-and-the-taking-back-of-downtown-ciudad-juarez/.

28 *See* Maria Esquinca, *Dual language education system expanding in border schools seeking to close learning gap*, BORDERZINE (Jan. 14, 2015), http://borderzine.com/2015/01/dual-language-education-system-expanding-in-border-schools-seeking-to-close-learning-gap/.

29 RIPPBERGER & STAUDT, *supra* note 9 at 16.

30 *Id.* at 102-03.

II. Cities along the U.S.-Mexico boundary have a long and continuing history of community and cooperation with their cross-border neighbors.

Reflecting the connections among its people, the border region's cities in many ways act in tandem with their counterparts on the other side. In fact, El Paso was once all Mexican territory; it was ceded to the United States in the 1848 Treaty of Guadalupe Hidalgo.[31] But workers and families continued to freely traverse the invisible line between Juárez and El Paso. It was not until 1993 that the United States began meaningfully restricting flows across the border.[32]

The cross-border community of Ambos Nogales—comprising Nogales, Arizona and Nogales, Sonora—shares a similar history. Founded as a single trading post in 1882, Nogales had no physical barrier at the borderline until 1918, and even thereafter, the barrier that was erected functioned like a picket fence

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31 *See* KATHLEEN STAUDT, FREE TRADE? INFORMAL ECONOMIES AT THE U.S.-MEXICO BORDER 33 (1998); DANIEL D. ARREOLA & JAMES R. CURTIS, THE MEXICAN BORDER CITIES: LANDSCAPE ANATOMY AND PLACE PERSONALITY 13 (1993); *see also* RIPPBERGER & STAUDT, *supra* note 9 at 25 ("A town that was once exclusively Mexican, Paso del Norte, was divided into two nations in the mid-1800s. . . . Because of a common history, though, the two cities have a natural affiliation that they maintain in spite of their political division.").

32 STAUDT, *supra* note 31 at 32; ORTIZ & CONTRERAS, *supra* note 7 at 167.

allowing easy movement from one side to the other.[33] For several decades, living in these cross-border communities was not unlike living in Friendship Heights in D.C., where one might not even notice having crossed into Maryland—or living in South Lake Tahoe, California and crossing by chance into Nevada during a morning jog.

A sturdier wall was built through Ambos Nogales in the 1990s, but residents remember that, as recently as 2007, no passport was necessary to cross the border.[34] Even as of this writing, lack of a passport usually results in only a few words of admonition before crossing is allowed.[35]

The major effect of these barriers has been to increase the time that people must spend to cross the

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33 *See* EDWARD S. CASEY & MARY WATKINS, UP AGAINST THE WALL: RE-IMAGINING THE U.S.-MEXICO BORDER 28-29 (2014); Randall H. McGuire, *Steel Walls and Picket Fences: Rematerializing the U.S.-Mexican Border in Ambos Nogales*, 115 AMERICAN ANTHROPOLOGIST 466, 467 (2013); Daniel D. Arreola, *La Cerca y Las Garitas de Ambos Nogales: A Postcard Landscape Exploration*, 43 J. SW. 505, 516 (2001).

34 *See* Julia Preston, *Tighter Passport Rules for U.S. Citizens Start Tuesday*, N.Y. TIMES, Jan. 22, 2007, *available at* http://www.nytimes.com/2007/01/22/us/22passport.html.

35 Wren Abbott, *Unspoken rule allows passport-free border crossings*, NOGALES INTERNATIONAL (Nov. 1, 2010), http://www.nogalesinternational.com/news/unspoken-rule-allows-passport-free-border-crossings/article_c24349d7-6d03-57d1-a140-084ab521c7f7.html; email from Jeremy Slack, Assistant Professor of Geography, The University of Texas at El Paso, to Courtney J. Chin et al. (Nov. 16, 2016, 12:41 PST) (on file with counsel).

border. The region's residents are endlessly sharing strategies for time-efficient crossing. In recent years, U.S. Customs and Border Protection (CBP) has launched programming to speed up the process and has developed a smartphone application, "Border Wait Times," to provide traffic information to drivers and pedestrians.[36]

Meanwhile, frequent crossers or commuters—if they clear an FBI background check and prove their employment—may sign up for CBP's SENTRI program for expedited entry to the United States.[37] Cleared Mexican citizens are also eligible for repeat-visit B1/B2 visas for shopping, family visits, and tourism on the U.S. side up to 75 miles from the border.[38]

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[36] *See* Laura Barron-Lopez, *Here's A Border Program That Actually Works*, THE HUFFINGTON POST (Sept. 17, 2015), http://www.huffingtonpost.com/entry/border-control-el-paso_us_55f33ec6e4b042295e365f84; Vic Kolenc, *App Gives Estimated Wait Times for Border Crossing*, GOVERNMENT TECHNOLOGY (Dec. 23, 2014), http://www.govtech.com/applications/App-Gives-Estimated-Wait-Times-for-Border-Crossing-.html.

[37] *Secure Electronic Network for Travelers Rapid Inspection*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/travel/trusted-traveler-programs/sentri (last visited Dec. 6, 2016).

[38] *Border Crossing Card*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/visas/en/visit/border-crossing-card.html (last visited Dec. 6, 2016); *Border Crossing Card*, U.S. CUSTOMS & BORDER PROTECTION, https://help.cbp.gov/app/answers/detail/a_id/1634/~/border-

But stronger barriers and longer wait times have not fundamentally changed the character of the cross-border communities along the U.S.-Mexico divide.[39] The streets that lie to either side of the borderline remain bustling places, and from Tijuana-San Diego to Ambos Nogales to Douglas-Agua Prieta, artists have painted murals over the border fence to make it blend in to their communities.[40]

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crossing-card---documentation-requirements-for-mexican-citizens (last visited Dec. 6, 2016).

39 *See, e.g.*, MARTINEZ, *supra* note 5 at 12 ("Twin-city complexes such as Brownsville-Matamoros, Laredo-Nuevo Laredo, Ciudad Juárez-El Paso, Douglas-Agua Prieta, Nogales-Nogales, Calexico-Mexicali, and San Diego-Tijuana are in the forefront of borderlands interaction. These urban centers function as unified entities despite the division imposed by the international boundary. A prominent borderlands scholar characterizes the urbanized border strip as 'an overlap with a line drawn through the middle of it,' while an experienced urban planner refers to the paired border communities as Siamese twins."); ERIK LEE ET AL., THE STATE OF THE BORDER REPORT: A COMPREHENSIVE ANALYSIS OF THE U.S.-MEXICO BORDER 31 (Erik Lee & Christopher E. Wilson eds., 2013) ("[T]he border is a bicultural space with local interests overlapping in a way that largely ignores the international boundary . . . ."); Dear, *supra* note 10 at 3 ("Cultural and ethnic mixing swiftly became facts of life along the changing frontier . . . . A common refrain, then as now, was that the border had moved, not the people living of the newly-constituted borderland.").

40 *See, e.g.*, Paulina Pineda, *Artist uses paint to 'erase' border fence*, NOGALES INTERNATIONAL (Oct. 14, 2015), http://www.nogalesinternational.com/news/artist-uses-paint-to-erase-border-fence/article_9c6d89b8-72a0-11e5-87f9-57978b03f324.html.

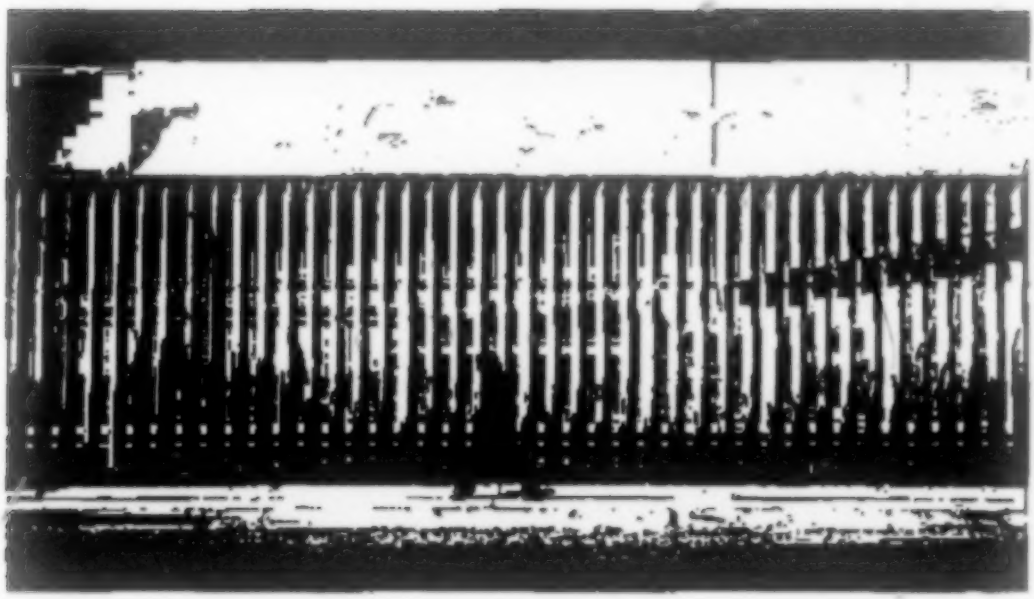

Figure 4. A man walks along the border in Agua Prieta, Mexico, separated from Douglas, Arizona by a painted fence. Courtney Pedroza, DALLAS NEWS (July 18, 2016), http://interactives.dallasnews.com/2016/border-poll/.

Numerous cross-border institutions engage in joint environmental efforts and also cement the political and economic interdependence of the sister cities.[41] When a dam in Juárez threatened to burst and flood downtown El Paso, the two countries' joint International Boundary and Water Commission

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41 Examples include the North American Development Bank, the U.S.-Mexico High-Level Economic Dialogue, the Bilateral Executive Steering Committee, the Border Trade Alliance, and the United States-Mexico Border Health Commission. *See generally* WILSON CENTER, THE U.S.-MEXICO BORDER ECONOMY IN TRANSITION (Erik Lee & Christopher Wilson eds., 2015), *available at* https://www.wilsoncenter.org/sites/default/files/Border_Economy_Transition_Wilson_Lee.pdf; *see also* UNITED STATES-MEXICO BORDER HEALTH COMMISSION, http://www.borderhealth.org/index.php (last visited Dec. 6, 2016).

deployed engineers to build a new canal to relieve pressure and ensure the safety of both cities.[42] Events like the U.S.-Mexico Border Governors Conference and the U.S.-Mexico Border Legislative Conference also facilitate discussion and combined efforts to resolve issues facing both governments, recognizing that the health, environment, and economy of each city here is intimately tied to its cross-border sister.[43] Joint efforts by the two countries to confront shared challenges help to ensure that each pair of cities continues to exist as one community.

Emergency services along the border also have a long history of helping one another. Mexican and U.S. hospitals coordinate with CBP to clear a lane of traffic for cross-border transfers of medical patients

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42 *Juarez dam no longer a threat to El Paso*, ASSOCIATED PRESS (Aug. 7, 2007), http://www.chron.com/news/houston-texas/article/Juarez-dam-no-longer-a-threat-to-El-Paso-1530054.php.

43 WILSON CENTER, *supra* note 41 at 25; *see also* Diane Austin, *Confronting Environmental Challenges on the US-Mexico Border: Long-Term Community-Based Research and Community Service Learning in a Binational Partnership*, 18 J. CMTY. PRACTICE 361 (2010); Federico G. de Cosio et al., *United States-Mexico Border Diabetes Prevalence Survey: lessons learned from implementation of the project*, 28 REV PANAM SALUD PUBLICA 151 (2010); Michael A. Flynn et al., *Improving Occupational Safety and Health Among Mexican Immigrant Workers: A Binational Collaboration*, 128 PUBLIC HEALTH REPORTS 33 (2013); BINATIONAL BORDER INFECTIOUS DISEASE SURVEILLANCE PROGRAM (BIDS) (June 2015), http://www.cdc.gov/usmexicohealth/pdf/bids-fact-sheet.pdf.

(including non-U.S. citizens) to U.S. hospitals.[44] In Nogales, the cities pass water from one side to another during drought,[45] and send fire trucks to safeguard cross-border neighbors during emergencies.[46]

III. Cross-border trade, commerce, and tourism fuel the border region's economy in both Mexico and the United States.

The economic vitality of borderland communities also depends to a great degree on the international flow of both people and goods. Different prices prevailing on opposite sides generate significant trade, and as noted above, the resulting cross-border traffic is immense. Studies estimate that the U.S. economy loses $116 million for every *minute* of delay

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[44] Joseph J. Kolb, *Delivering Critical Care in Ciudad Juárez and on the U.S.-Mexico Border*, J. EMERGENCY MED. SERVS. (Apr. 1, 2014), http://www.jems.com/articles/print/volume-39/issue-4/features/delivering-critical-care-in-ciudad-ju-rez-and-on-the-u-s-mexico-border.html; Ieva Jusionyte, *Interview with CBP: Patient Transfer at the Port of Entry*, BORDER RESCUE PROJECT (Sept. 8, 2015), http://www.borderrescueproject.com/journal/2015/9/8/d6deqxondncx8yjohr6aivtzgs9ami.

[45] TERRY W. SPROUSE, WATER ISSUES ON THE ARIZONA-MEXICO BORDER: THE SANTA CRUZ, SAN PEDRO AND COLORADO RIVERS 4 (2005).

[46] *See* Manuel C. Coppola, *Blaze in Nogales, Sonora battled from both sides of the border*, NOGALES INTERNATIONAL (May 10, 2012), http://www.nogalesinternational.com/news/blaze-in-nogales-sonora-battled-from-both-sides-of-the/article_3267761e-9b0d-11e1-85e7-001a4bcf887a.html.

Figure 5. Firefighters in Nogales, Arizona reach over the border fence to put out a fire in Nogales, Sonora. Manuel C. Coppola, NOGALES INTERNATIONAL (May 10, 2012), http://www.nogalesinternational.com/news/blaze-in-nogales-sonora-battled-from-both-sides-of-the/article_3267761e-9b0d-11e1-85e7-001a4bcf887a.html.

in inspection lanes at the five busiest points of entry on the border with Mexico.[47]

A significant portion of this traffic represents individual residents from each country who cross to the other in order to purchase goods and services. In Paso del Norte, approximately 55 percent of households shop across the border for comparative price advantages.[48] El Pasoans cross for health and dental care, which is frequently less expensive in Mexico, while Mexican shoppers regularly cross the border seeking electronics, clothing, and household

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47 Barron-Lopez, *supra* note 36.

48 STAUDT, *supra* note 31 at 71.

items.[49] These visiting Mexican shoppers have recently spent more than $445 million per year with El Paso retailers.[50] In Nogales, Arizona, Mexican visitors yield some 60 to 80 percent of sales tax collections.[51] And during the holiday season alone, cross-border shopping creates over 5,000 jobs in the cities along the U.S. side of the border.[52]

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[49] *Id.* at 71-72; Jessica Chapin, *Reflections from the Bridge*, *in* ETHNOGRAPHY AT THE BORDER 10 (Pablo Vila ed., 2003); Kathleen Staudt et al., *In the shadow of a steel recycling plant in these neoliberal times: health disparities among Hispanics in a border* colonia, 21 LOCAL ENVIRONMENT 636, 645 (2016) (recounting the story of a man who could not receive treatment for his impending heart attack in the U.S., but sought medical care in Juárez and has survived in good health).

[50] *See* STEVE NIVIN, SPENDING PATTERNS AND ECONOMIC IMPACTS OF MEXICAN NATIONALS ON EL PASO: A COMPARISON TO CENTRAL AND SOUTH TEXAS, 2010-2012, 5 (2015); U.S. DEP'T OF COMMERCE, EL PASO, TX: MERCHANDISE EXPORTS IN 2015 (2016); *see also* Robert Gray, *$446M: What Mexicans spend in El Paso*, EL PASO INC. (Apr. 27, 2015), http://www.elpasoinc.com/news/local_news/article_bbb787cc-ecec-11e4-b6b5-3fbb35ffa014.html (noting that Mexican shoppers spent even more in Hidalgo County, home to McAllen, Texas).

[51] Jonathan Clark, *CBP stats show big drop in local border-crossings*, NOGALES INTERNATIONAL (Dec. 20, 2011), http://www.nogalesinternational.com/news/cbp-stats-show-big-drop-in-local-border-crossings/article_28530fac-2aac-11e1-8f2e-0019bb2963f4.html.

[52] *See* Pauline Sullivan et al., *Mexican national cross-border shopping: Exploration of retail tourism*, 19 J. RETAILING & CONSUMER SERVS. 596, 601 (2012).

Tourism too constitutes an important industry in the border economy. Tijuana, Nogales, Juárez, and Mexicali are all popular destinations for U.S. travelers. In cities like these, most restaurants and businesses catering to tourists are within a few blocks of the border.[53] Accordingly, travel guides recommend that American visitors park their cars on the U.S. side and walk into Mexico.[54] Given the volume of people who cross between Mexico and the United States to vacation—in addition to those who cross to shop, eat, and work—it would be unwise to assume the nationality of any person seen just beside the border, on either side.

* *

CONCLUSION

In considering this case, *amici* urge the Court to recognize that the metropolitan areas along the border region—though they extend into two countries—are unified communities of families, workers, and businesses. When a person who lives

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53 *See* ARREOLA & CURTIS, *supra* note 31 at 86, 93; EDWARD R. BURIAN, THE ARCHITECTURE AND CITIES OF NORTHERN MEXICO FROM INDEPENDENCE TO THE PRESENT 181 (2015) ("The primary commercial strip through [Nogales, Sonora] is Avenida Obregón, with many tourist-oriented shops, restaurants, bars, and pharmacies only a few blocks from the border.").

54 *See, e.g.*, JOHN NOBEL ET AL., LONELY PLANET, MEXICO 745 (14th ed. 2014); DK EYEWITNESS TRAVEL, ARIZONA & THE GRAND CANYON 103 (6th ed. 2015); JOHN FISHER ET AL., ROUGH GUIDES, THE ROUGH GUIDE TO MEXICO 519 (9th ed. 2013).

here walks beside the border, he walks beside a fence that is a mundane and unremarkable fixture in his world. He walks past shopkeepers trying their hardest to attract tourists; he walks where his neighbors buy their clothes and eat their meals. Whether Mexican or American, he walks through the middle of his community.

Respectfully submitted.

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RECORD AND BRIEFS

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JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a culvert on the border between the United States and Mexico that U.S officials patrol and effectively control, Jesus Mesa, a U.S. Border Patrol agent, shot and killed Sergio Hernández, a 15-year-old Mexican boy, without justification or provocation. Hernández's family, petitioners here, seek to remedy this abuse of government power and ensure compliance with the limits the Fourth Amendment places on the use of force by law enforcement officers. The Constitution's promise of access to the courts ensures that they can do so. Indeed, suits such as this one, cognizable under *Bivens v. Six Unknown Named*

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), are an indispensable mechanism for ensuring that the government abides by fundamental Fourth Amendment limitations on its authority. Closing the courthouse doors by foreclosing the only legal remedy available to Hernández's family would effectively give the government the power "to switch the Constitution on or off at will" at the border, *Boumediene v. Bush*, 553 U.S. 723, 765 (2008), thereby allowing the government to abuse its power unchecked. Even at the border, "[n]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882).

Three precepts firmly embedded in the Constitution's text and history strongly support permitting an action under *Bivens* here. First, Article III created a federal judiciary with broad power to enforce the Constitution's limitations on the power of government in cases that came before the courts. When the Framers wrote our Founding charter more than two centuries ago, they gave the judicial branch of the government a critical role to play in our system of separation of powers. Under our Constitution, courts perform an essential checking function on the political branches of government, ensuring fidelity with the Constitution's structure and guarantee of individual rights. The Framers understood that constitutional "[l]imitations . . . can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *The*

Federalist No. 78, at 434 (Hamilton) (Clinton Rossiter ed. 1961). In the Framers' constitutional design, when other branches transgress the Constitution's limits, "the judicial department is a constitutional check." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 196 (Jonathan Elliot ed., 1836) [hereinafter *Elliot's Debates*]. *Bivens* enforces this structural constitutional principle.

Second, and intimately related to the first, the Framers wrote Article III to ensure that where there is a legal right, there is also a legal remedy for violation of that right. The Framers, who were steeped in English common law traditions, understood that legal rights were meaningless without the right to go to court to obtain a remedy when those rights were violated. As this Court recognized in *Marbury v. Madison*, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* *23). *Marbury* affirmed that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." *Id.*

Third, these fundamental rule of law principles have deep roots, not only in the text and history of Article III, but in the history of the Fourth Amendment itself. "All the major English cases that inspired the Fourth Amendment were civil jury actions," in which juries awarded damages to prevent abuse of power by British law enforcement officers. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 775 (1994). The Framing generation that insisted that the Fourth Amend-

ment's freedom from unreasonable searches and seizures be added to the Constitution viewed such suits for damages as a critical bulwark against abuse of power by the government. As one Anti-Federalist essayist made the point, "[N]o remedy has been yet found equal to the task of deterring and curbing the insolence of office, but a jury—It has become an invariable maxim of English juries, to give ruinous damages whenever an officer has deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression." Essays by a Farmer, I (Feb. 15, 1788), *in* 5 *The Complete Anti-Federalist* at 14 (Herbert J. Storing ed. 1981). "Because officers who violated the Fourth Amendment were traditionally considered trespassers, individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits . . . ." *Utah v. Strieff*, 136 S. Ct. 2056, 2060-61 (2016).

Consistent with each one of these deeply embedded principles, this Court in *Bivens* held that "damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials," recognizing that "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395. *Bivens* reflects the principle that "the Constitution must be enforceable by individuals even when the political branches do not choose it to be," Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 So. Cal. L. Rev. 289, 292 (1995), and therefore "litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Davis v. Passman*, 442

U.S. 228, 242 (1979). While this Court has refused to extend *Bivens* to contexts where other remedies are available, *see, e.g.*, *Minneci v. Pollard*, 132 S. Ct. 617 (2012) (suit against private prison guard under state law); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (suit against federal officers), this case is controlled by the core holding in *Bivens*: here, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

Under our constitutional system of separated powers, the courts are an essential barrier against abuse of power, preventing the "political branches" from "switch[ing] the Constitution on or off at will." *Boumediene*, 553 U.S. at 765. "Because the Constitution's separation-of-powers structure . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles," *id.* at 743, including the Constitution's promise of access to the courts. When a federal officer uses lethal force to kill an innocent civilian without justification, the ultimate responsibility to enforce the Constitution and prevent abuse of power by the government lies with the courts.

ARGUMENT

I. THE TEXT AND HISTORY OF ARTICLE III GIVE THE FEDERAL COURTS BROAD JUDICIAL POWER TO PROTECT CONSTITUTIONAL RIGHTS AND PREVENT ABUSE OF POWER BY THE GOVERNMENT.

Article III of the Constitution broadly extends the "judicial Power" to nine categories of cases and controversies, including "all Cases, in Law and Equity, arising under this Constitution, the Laws of the

United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. Const. art. III, § 2, cl. 1. Article III's plain language empowers the "judicial department" to "decide all cases of every description, arising under the constitution or laws of the United States," extending to the federal courts the obligation "of deciding every judicial question which grows out of the constitution and laws." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382, 384 (1821).

The Constitution's sweeping grant of judicial power to the newly created federal courts was a direct response to the infirmities of the Articles of Confederation, which established a single branch of the federal government and no independent court system. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 (1987) (explaining that Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power"). Under the dysfunctional Articles of Confederation government, individuals could not go to court to enforce federal legal protections, prompting Alexander Hamilton to observe that "[l]aws are a dead letter without courts to expound and define their true meaning and operation." *The Federalist No. 22*, *supra*, at 118 (Hamilton).

The Framers recognized that "there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? . . . No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them." *The Federalist No. 80*, *supra*, at 443-44 (Hamilton). At the

Convention, the Framers extensively debated different possible means to ensure compliance with the Constitution. As the Convention unfolded, the Framers chose judicial review as a critical constitutional check designed to prevent concentration of power, *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring), "make Government accountable," and "secure individual liberty." *Boumediene*, 553 U.S. at 742. While the judiciary would not have "the sword or the purse," *The Federalist No. 78, supra,* at 433, it would have broad powers to enforce constitutional limitations and maintain the rule of law.

The Virginia Plan proposed at the beginning of the Convention authorized the "National Legislature" to "negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union" and provided for a "council of revision," composed of members of the executive and judicial branches, "to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final," while granting to the courts the power to resolve "questions which may involve the national peace and harmony." 1 *The Records of the Federal Convention of 1787*, at 21, 22 (Max Farrand ed., 1911). Over the course of the Convention, both the Council of Revision and the congressional negative were rejected in favor of giving to the judicial branch "the power of construing the constitution and laws of the Union in every case . . . and of preserving them from all violation from every quarter . . . ." *Cohens*, 19 U.S. at 387, 388.

The Framers rejected the Council of Revision because they believed that "the Judges ought to be able to expound the law as it should come before them,

free from the bias in having participated in its formation." 1 *Farrand's Records* at 98. As Rufus King explained, "the Judges will have the expounding of those Laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the [C]onstitution." *Id.* at 109; *see* 2 *id.* at 76 ("[A]s to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative."). As the debate reflects, "the single most important reason the Council of Revision was rejected derived from the Convention's commitment to judicial review as an integral part of the constitutional structure." Robert L. Jones, *Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance*, 27 J.L. & Pol. 459, 507 (2012).

For similar reasons, the Framers rejected the congressional negative, preferring judicial review to congressional control. As Gouverneur Morris argued, "[a] law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. Law." 2 *Farrand's Records* at 28. Over the course of the rest of the Convention, the Framers expanded the jurisdiction of the federal courts, ensuring that the Article III judiciary would be "competent to the decision of any question arising out of the Constitution," 4 *Elliot's Debates* at 156 (Davie), and federal laws, giving the federal courts the power to decide "all questions arising upon their construction, and in a judicial manner to carry those laws into execution." Luther Martin, *The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the*

General Convention (Nov. 29, 1787), *reprinted in* 3 *Farrand's Records* at 172, 220.

In the ensuing debates over ratification of the Constitution, Federalists and Anti-Federalists alike agreed that Article III gave the federal courts broad powers to enforce the Constitution's limits on the power of government. In the state ratifying conventions, supporters of the Constitution repeatedly made the case that the judicial branch would provide a critical check on the political branches, guaranteeing individual rights and ensuring compliance with the Constitution's structure. In the Virginia ratifying convention, John Marshall argued, "[t]o what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." 3 *Elliot's Debates* at 554. James Madison explained the Constitution's "new policy" of submitting constitutional questions to the "judiciary of the United States": "[t]hat causes of a federal nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the Union are secured by these restrictions." *Id.* at 532. In the Connecticut ratifying convention, Oliver Ellsworth explained that "[i]f the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it be void." 2 *id.* at 196.

Anti-Federalists complained bitterly about Article III's broad sweep, insisting that "[t]he jurisdiction of all cases arising under the Constitution and the laws

of the Union is of stupendous magnitude." 3 *id.* at 565 (Grayson). These arguments did not carry the day. Rejecting Anti-Federalist claims that the breadth of judicial power conferred in Article III was too sweeping, the American people ratified the Constitution, giving to the newly created federal courts broad judicial power to ensure that "the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed." 4 *id.* at 160 (Davie). The American people recognized that "[t]hese ends can only be accomplished by a general, paramount judiciary." *Id.*

In 1789, when the Bill of Rights was added to the Constitution, the Framers reaffirmed the role of the federal courts in ensuring that the government respects constitutional limitations. Introducing the Bill of Rights in Congress, James Madison observed that "[i]f the [Bill of Rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally lead to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 Annals of Cong. 457 (1789).

Just as Madison had recognized that "causes of a federal nature" will arise under those provisions of the Constitution in which "states are laid under restrictions," 3 *Elliot's Debates* at 532, Madison insisted that the federal courts would have the obligation to enforce the rights laid out in the Bill of Rights in cases that came before them. Judicial review was the key to ensuring that the guarantees of the Bill of Rights were not "paper barriers . . . too weak to be

worthy of attention," but rather real, enforceable limits on the power of the federal government that would operate "against the majority in favor of the minority." 1 Annals of Cong. at 455, 454.

In creating an independent federal judiciary with the power to enforce constitutional limitations and maintain the rule of law, the Framers incorporated long established common law principles that allowed courts to vindicate individual rights and enforce the rule of law. The next Section examines those principles.

II. THE FRAMERS WROTE ARTICLE III TO ENSURE THAT WHERE THERE IS A LEGAL RIGHT, THERE IS A LEGAL REMEDY FOR INFRINGEMENT OF THAT RIGHT.

The Framers, recognizing that legal rights are meaningless if individuals lack the ability to go to court to obtain a remedy when a right is violated, wrote Article III to ensure that such legal remedies exist. Steeped in the writings of Sir William Blackstone, the Framers understood that rights and remedies must go hand in hand if courts are to play their essential role in the Constitution's system of separation of powers: expounding the law and vindicating individual liberty. *See The Federalist* No. 43, *supra,* at 242 ("[A] right implies a remedy.") (Madison). As Blackstone had written, it was a "general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 William Blackstone, *Commentaries on the Laws of England* *23. "[I]n vain would rights be declared, in vain directed to be observed," Blackstone explained, "if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of

the law." 1 *id.* at 55-56; *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) ("Historically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more.").

These fundamental rule-of-law values were affirmed by a number of Founding-era state constitutions, which explicitly guaranteed redress for violations of legal rights. For example, the Massachusetts Constitution of 1780 provided that "[e]very subject . . . ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws." Mass. Const. of 1780, art. XI. Other State Constitutions used similar formulations to protect the right of individuals to seek redress in the courts for violations of their legal rights. *See, e.g.*, Md. Const. of 1776, art. XVII; N.H. Const. of 1784, art. XIV; Vt. Const. of 1786, ch. 1, para. 4; Pa. Const. of 1790, art. IX, § 11; Del. Const. of 1792, art. I, § 9; Ky. Const. of 1792, art. XII, § 13; Tenn. Const. of 1796, art. XI, § 17.

In *Marbury v. Madison*, Chief Justice Marshall recognized that these fundamental rule-of-law principles were secured by the U.S. Constitution. Chief Justice Marshall's opinion in *Marbury* explained that, under Article III, the "province of the court is, solely, to decide on the rights of individuals," and he invoked Blackstone's discussion of common law principles that ensure that "'every right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury*, 5 U.S. at 170, 163 (quoting 3 Blackstone,

supra, at *109). As *Marbury* observed, a broad understanding of the individual's right to go to court to redress violations of personal rights was necessary to ensure "the very essence of civil liberty"—"the right of every individual to claim the protection of the laws, whenever he receives an injury"—and ensure our Constitution's promise of a "government of laws, and not of men." *Id.* at 163.

"From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court," *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 66 (1992), beginning with *Marbury*. In *Marbury*, it did not matter that federal law did not grant an express right of action to Marbury, or even that "the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute." 5 U.S. at 172. Since the refusal to deliver the commission violated his individual right to the office, Marbury had "a right to resort to the laws of his country for a remedy." *Id.* at 166; *id.* at 165 (explaining that such suits are "examinable in a court of justice"). For more than two centuries, the "historic judicial authority to award appropriate relief . . . has been thought necessary to provide an important safeguard against abuses of legislative and executive power . . . as well as to ensure an independent Judiciary." *Franklin*, 503 U.S. at 74; *see Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 350 (1816) (rejecting a construction of Article III because the result "would, in many cases, be rights without corresponding remedies"); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838) (explaining that it would be a "monstrous absurdity in a well organized government, that there should be no remedy, alt-

hough a clear and undeniable right should be shown to exist").

The Framers' linkage of rights and remedies is directly reflected, not only in Article III, but in the text and history of the Fourth Amendment as well. As the next Section shows, the Framers of the Fourth Amendment wrote into the Constitution a sweeping guarantee of freedom from unreasonable searches and seizures against the backdrop of landmark English cases in which juries awarded damages in civil suits to check abuse of authority by the Crown.

III. THE FRAMERS OF THE FOURTH AMENDENT VIEWED CIVIL DAMAGE SUITS AGAINST GOVERNMENT OFFICERS AS A CRITICAL BULWARK AGAINST GOVERNMENT OVERREACH.

The Fourth Amendment was the "founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself." *Riley v. California*, 134 S. Ct. 2473, 2494 (2014). The Framers viewed these indiscriminate searches as "'the worst instrument of arbitrary power . . . because they placed 'the liberty of every man in the hands of every petty officer.'" *Stanford v. Texas*, 379 U.S. 476, 481 (1965) (quoting *Boyd v. United States*, 116 U.S. 616, 625 (1886)). As the history of the Fourth Amendment shows, the Framers viewed civil damage actions—the very kind of suits cognizable under *Bivens*—as a critical check on abuse of power by the government.

The Framers' understanding of the guarantee against unreasonable searches and seizures was

shaped by a host of foundational English cases decided in the 1760s, *Wilkes v. Wood*, 19 How. St. Tr. 1153 (C.P. 1763); *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763); *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765); *Leach v. Money*, 19 How. St Tr. 1001 (K.B. 1765), in which juries awarded tort damages to individuals whose homes were invaded or whose papers were searched by the King's officers. These cases, all growing out of general warrants issued in response to the publication of the North Briton No. 45, a pamphlet critical of the King, put the role of the jury in awarding damages and limiting abuse of power by the government center stage.

As the counsel for Wilkes argued in the most prominent of these cases, "the constitution of our country had been so fatally wounded, that it called aloud for the redress of a jury of Englishmen." *Wilkes*, 19 How. St. Tr. at 1154. The jury, Wilkes argued, should perform its role of "instructing those great officers in their duty, and that they (the jury) would now erect a great sea mark, by which our state pilots might avoid, for the future, those rocks upon which they now lay shipwrecked." *Id.* at 1155. The jury's award of £4000 in damages to Wilkes, "roughly equivalent to £500,000 today," Hon. M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. Rev. 905, 910 (2010), vindicated these arguments.

Wilkes, and the cases that followed it, demonstrated to the Framers that civil damage actions were an essential method of protecting individual liberty and limiting abuse of power, preventing "the secret cabinets and bureaus of every subject in this kingdom [from] be[ing] thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit . . . ." *Entick*, 19 How. St. Tr. at 1063.

Time and again, the British courts rejected the use of general warrants to immunize officers from liability as "totally subversive of the liberty of the subject," *Wilkes*, 19 How. St. Tr. at 1167, instead upholding damage awards that, in some cases, were quite substantial. Amar, *Fourth Amendment First Principles*, *supra*, at 797 ("As civil plaintiffs, John Wilkes and company . . . had recovered a King's ransom from civil juries to teach arrogant officialdom a lesson and to deter future abuse."). Indeed, in *Wilkes*, the court specifically affirmed the power of the jury to award damages "not only as satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future." 19 How. St. Tr. at 1167; *see Huckle*, 95 Eng. Rep. at 768-69 (upholding jury's award of "exemplary damages" in light of the "great point of law touching the liberty of the subject" and the Crown's "exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom").

"The early mischief—the British Crown's unbridled power of search—is at the center of the rich history that led to the adoption of the Fourth Amendment." Michael, *supra*, at 906. *Wilkes*, as well as other cases, were widely covered in American newspapers, and "the reaction of the colonial press to that controversy was intense, prolonged, and overwhelmingly sympathetic to Wilkes." William Cuddihy: *The Fourth Amendment: Origins and Original Meaning* 538 (2009); *see id.* at 539 (discussing the scope of the coverage in the colonial press); *id.* at 538 (noting that a "revulsion to general warrants ensued in the colonies" following the Wilkes controversy). As this Court observed in *Boyd*, "every American statesman, during our revolutionary period and formative period as a nation, was undoubtedly familiar" with "the

landmarks of English liberty," *Boyd*, 116 U.S. at 626, and they had a powerful effect on the framing of the Fourth Amendment.

The failure to include a Bill of Rights in the original Constitution launched an avalanche of criticism, as many insisted that the Constitution was deficient without guarantees for substantive fundamental rights essential to liberty. Anti-Federalists lamented that, without a Bill of Rights, "any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power." 3 *Elliot's Debates* at 588 (Henry); *see Maryland v. King*, 133 S. Ct. 1958, 1980-81 (2013) (Scalia, J., dissenting). Those who fought to add the Fourth Amendment to the Constitution emphasized, in line with *Wilkes*, the role of the courts in checking governmental abuse of the power to search and seize. Civil damage actions, they understood, were critical to prevent abuse of power by the government. "To Americans, one lesson of the *Wilkes* Cases was that juries could avert outrageous searches by subjecting those responsible to exemplary, financial damage." Cuddihy, *supra*, at 760.

Those urging new search and seizure protections consistently emphasized the role of and need for civil damage remedies to curb the unbridled discretion of federal officers. For example, a Maryland Anti-Federalist essayist, writing under the name of *A Farmer*, insisted on the constitutional checking function performed by civil damages remedies, referring to the role juries had played in the *Wilkes* case. "[N]o remedy has been yet found equal to the task of deterring and curbing the insolence of office, but a jury—It has become an invariable maxim of English juries, to give ruinous damages whenever an officer has devi-

ated from the rigid letter of the law, or been guilty of an unnecessary act of insolence or oppression." Essays by a Farmer, I (Feb. 15, 1788), *in* 5 *The Complete Antifederalist* at 14 (Herbert J. Storing ed., 1981). Likewise, Marylander Luther Martin emphasized that "jury trials"—which he called "the surest barrier against arbitrary power, and the palladium of liberty"—were "most essential for our liberty" in "every case . . . between governments and its officers in one part and the subject or citizen on the other." Luther Martin, *The Genuine Information*, *supra*, *in* 3 *Farrand's Records* at 221, 222.

Elsewhere, too, Anti-Federalists seeking to add search and seizure protections to the Constitution highlighted the need for civil damage remedies to prevent abuse of government power, reflecting the lessons of *Wilkes*. During debates in Pennsylvania in 1787, one Anti-Federalist writer argued that, if "a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift . . . a trial by jury would be our safest resource, heavy damage would at once punish the offender, and deter others from committing the same . . . ." Essay of A Democratic Federalist (Oct. 17, 1787), *in* 3 *The Complete Anti-Federalist* at 58, 61 (Herbert J. Storing ed., 1981). Likewise, in Massachusetts, the essayist Hampden insisted that "[w]ithout [a jury] in civil actions, no relief can be had against the High Officers of State, for abuse of private citizens . . . ." Essays By Hampden, Massachusetts Centinel, Jan.-Feb. 1788, *in* 4 *The Complete Anti-Federalist* 198, 200 (Herbert J. Storing ed., 1981).

These arguments carried the day, and the Fourth Amendment was added to the Constitution, establishing broad protections "indispensable to the full en-

joyment of the rights of personal security, personal liberty, and private property." Joseph Story, *Commentaries on the Constitution of the United States* § 1895 (1833). As the history of the Fourth Amendment shows, its Framers expected the courts to be an "impenetrable bulwark against every assumption of power in the legislative or executive" and to "resist every encroachment upon [Fourth Amendment] rights," 1 Annals of Cong. at 457, using the time honored tools of civil damages to prevent individuals from being "searched and ransacked by the strong hand of power" in the "most arbitrary manner, without any evidence or reason." 3 *Elliot's Debates* at 588.

IV. A *BIVENS* ACTION IS APPROPRIATE TO ENFORCE THE FOURTH AMENDMENT WHEN THERE ARE NO ALTERNATIVE REMEDIES AVAILABLE.

Consistent with the text and history of both Article III and the Fourth Amendment, this Court in *Bivens* held that "damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials," reasoning that "damages have been regarded as an ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395. *Bivens* reflects Founding principles recognizing that "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment," *id.* at 407 (Harlan, J., concurring), and that "'rights' and remedies" are "link[ed]" in "a 1:1 correlation." *Id.* at 400 n.3 (Harlan, J., concurring). In light of these Founding principles, the *Bivens* Court concluded that "[t]he federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to

the victim of a constitutional violation." *Bush v. Lucas*, 462 U.S. 367, 378 (1983).

Under *Bivens*, when federal law supplies a basis for jurisdiction and when "some form of damages is the only possible remedy," *Bivens*, 403 U.S. at 409 (Harlan, J., concurring), "a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment." *Id.* at 399 (Harlan, J., concurring). In accord with the "'very essence of civil liberty,' 'the right of every individual to claim the protection of the laws, whenever he receives an injury," *id.* at 397 (quoting *Marbury*, 5 U.S. at 163), *Bivens* held that "litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Davis*, 442 U.S. at 242; *see Carlson v. Green*, 446 U.S. 14, 18 (1980); *see also Hartmann v. Moore*, 547 U.S. 250, 256 (2006).

The government in *Bivens* argued that a plaintiff seeking damages for an unconstitutional search and seizure may only bring a state common law tort action, relying on the historical pedigree of such suits. *See* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, The Westfall Act, and the Nature of the Bivens Question*, 161 U. Pa. L. Rev. 509, 531 (2013) ("From the beginning of the nation's history, federal . . . officials have been subject to common law suits . . . on the theory that the government lacks the power to authorize violations of the Constitution."). But *Bivens* rejected that approach, recognizing that "[t]he interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unrea-

sonable search and seizures, may be inconsistent or even hostile." *Bivens*, 403 U.S. at 394. Given "the limitations on state remedies for violation of common law rights," *Bivens* permitted a federal claim for violation of the Fourth Amendment's federal constitutional guarantee against unreasonable searches and seizures, insisting that these kinds of constitutional "injuries be compensable according to uniform rules of federal law." *Id.* at 409 (Harlan, J., concurring).

Bivens is rooted in the basic notion that there must be some meaningful remedy when federal officials violate the Constitution, as required by basic separation of powers principles. Otherwise, federal officers would have the power to trample on constitutional freedoms with impunity, producing the unchecked concentration of power the Framers feared. *See Boumediene*, 553 U.S. at 742 (noting the Framers' "view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power"); *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring) ("Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.").

Reflecting these moorings, this Court's cases since *Bivens* have made clear that *Bivens* "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest," *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007), and, in a number of cases, this Court has declined to extend *Bivens*, finding that other remedies were available. *See Minneci*, 132 S. Ct. at 623-26 (no *Bivens* action available because of possibility of state court suit against private prison guard); *Wilkie*, 551 U.S. at 555 ("Robbins's situation does not call for creating a constitutional cause of action for want of other means of vin-

dication, so he is unlike the plaintiffs in cases recognizing freestanding claims."); *Corr. Servs. Corp.*, 534 U.S. at 72 (no *Bivens* action where "alternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*"); *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (no *Bivens* action against federal agency because *Bivens* permits a suit against a federal officer "to deter *the officer*").

In *Wilkie*, this Court synthesized its precedents applying *Bivens*, setting out two basic considerations. First, "there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. Second, "'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Id.* (quoting *Bush*, 462 U.S. at 378); *see Minneci*, 132 S. Ct. at 621 (explaining that these dual inquiries "seek to reflect and to reconcile the Court's reasoning set forth in earlier cases"). Both considerations point decisively toward permitting Hernández to sue in this case to remedy the unjustified and unreasonable use of lethal force by Officer Mesa that resulted in the killing of Hernández's 15-year-old son.

First, here, as in *Bivens*, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). A *Bivens* suit here is the only means to ensure that federal officers respect the constitutional limits on their authority. Mesa cannot be sued in Mexican courts, or in any state court, for his use of deadly force that killed Sergio Hernández, and the United

States has refused to prosecute Mesa for his unnecessary and unreasonable use of lethal force, or permit his extradition to Mexico. *See* Pet'r Br. at 5-6, 41-44. If this Court closes the courthouse door in this case, the government will have the unchecked power to "switch the Constitution on or off at will" at the border, eliminating "an indispensable mechanism for monitoring the separation of powers." *Boumediene*, 553 U.S. at 765.

Second, "weighing reasons for and against the creation of a new cause of action, the way common law judges have always done," also makes clear that a *Bivens* action is appropriate here. *Wilkie*, 551 U.S. at 554. As history shows, civil damage actions against government officers who unlawfully search and seize persons is the quintessential method used "to implement [the Fourth Amendment's] guarantee," *Wilkie*, 555 U.S. at 550. Permitting this suit to go forward under *Bivens* would not be making new law, but simply recognizing what the text and history of the Fourth Amendment reflect: the Framers of the Fourth Amendment understood that civil damage suits were an appropriate method of redressing violations of the Fourth Amendment by federal officers. In our system of separation of powers, courts were viewed as the frontline defense against abuse of executive authority.

The fact that the arbitrary and unreasonable use of deadly force in this case occurred at the U.S.-Mexico border and resulted in the killing of a 15-year-old Mexican boy does not lessen this Court's duty to enforce the Constitution. "Because the Constitution's separation-of-powers structure . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." *Boumediene*, 553

U.S. at 743. Even at the border, when federal officers use lethal force in the "most arbitrary manner, without any evidence or reason," 3 *Elliot's Debates* at 588, courts have an obligation to hold them to account, ensuring that "[n]o officer of the law may set that law at defiance with impunity," *Lee*, 106 U.S. at 220.

CONCLUSION

For the foregoing reasons, this Court should hold that this case was properly brought under *Bivens*.

Respectfully submitted,

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JESUS C. HERNANDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR., ET AL.,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are twelve scholars of constitutional law. Some have written extensively on issues relating to the extraterritorial application of rights, and others have developed expertise more generally on the Constitution and the rights it protects. The *Amici* are concerned that the *en banc* decision of the court of appeals cannot be reconciled with this Court's governing precedents on the application of the Constitution outside the formal territory of the United States, and exposes children and adults in towns adjoining the U.S. border to arbitrary killing by federal agents.

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[1] *Amici* affirm that all parties have consented to the filing of this brief, and those consents are on file with the Clerk of Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

Amici submit this brief as constitutional law scholars concerned to ensure the proper scope of application for constitutional guarantees in extraterritorial contexts. In proceedings below, the court of appeals determined that a federal court could not hear the petitioners' Fourth and Fifth Amendment claims arising from the shooting and killing of an unarmed teenager at the border between the United States and Mexico, because the teenager lacked sufficient voluntary contact with the United States. The court of appeals erred by applying that standard and its judgment should be reversed on that basis.

This Court's governing precedents reject the formalistic standard adopted by the court of appeals, and instead require evaluation of the extraterritorial application of rights using the functional approach that this Court articulated in *Boumediene v. Bush* and in Justice Kennedy's controlling concurring opinion in *United States v. Verdugo-Urquidez*. The Court's decisions applying this functional approach establish that, while courts may inquire into the relationship between a person seeking relief and the United States, "voluntary connections" are by no means the sole or paramount factor determining the extraterritorial application of constitutional rights. Indeed, *Boumediene* itself applied a constitutional guarantee extraterritorially to individuals who had no voluntary connections to the United States, but rather were non-residents who had been forcibly brought to the Guantanamo Bay prison by U.S. authorities. As this Court explained, federal courts must instead take into account a range of relevant factors that affect the practicality of applying constitutional protections to people subjected to U.S. government power outside the country's borders. These factors include the characteristics of the person whose rights are at issue, the location of relevant events, and the practical obstacles to the application of the right extraterritorially in the relevant context.

The court below failed to apply this functional test, applying instead the standard proposed by four members of the Court in *Verdugo-Urquidez*. The plurality's standard never constituted a controlling decision of this Court and, indeed, was not accepted either in

Justice Kennedy's concurring opinion in *Verdugo-Urquidez* or in the opinions of the Court's remaining members, or by this Court in *Boumediene*. The court of appeals moreover erred in relying on *Verdugo-Urquidez* as resolving the issues before it, because *Verdugo-Urquidez* concerned only searches of property in foreign countries. Searches of property are fundamentally distinguishable from the issue presented here – the taking of human life – because the right to be free from unjustified killing does not vary among nations and their citizens, even if expectations of privacy might. *Verdugo-Urquidez* thus does not govern the constitutional inquiry in this case, which concerns the taking of human life as a "seizure" or deprivation under the Fourth and Fifth Amendments.

Proper application of this Court's functional approach shows that the Fourth and Fifth Amendments guaranteed Mr. Hernandez's life against a shooting by U.S. agents across the El Paso-Juarez border. Hernandez's status as an unarmed teenage civilian, his presence near the division between an interdependent pair of border communities, the fact that Respondent Mesa shot him from within U.S. territory, the absence of any practical obstacles to applying normal rules on the use of lethal force at the relevant time, and the crucial importance of the right at stake – the right to life itself – weigh together strongly in favor of the application of constitutional guarantees. Accordingly, *Amici* constitutional law scholars respectfully urge this Court to reverse the decision of the court of appeals based on its

failure to apply the appropriate standard for determining extraterritorial application of the constitutional guarantees at issue in this case.

ARGUMENT

I. The Governing Standard for This Case Is the Functional Approach Set Forth in *Boumediene v. Bush* and Not the Formalistic Approach of the Lower Court That *Boumediene* Rejected

This Court's controlling precedents require that courts apply a functional approach to determine whether a constitutional violation occurs under the Fourth and Fifth Amendments when a federal officer shoots and kills an individual outside U.S. borders. Under this functional approach, the extraterritorial application of constitutional rights turns upon a number of factors. *See Boumediene v. Bush*, 553 U.S. 723, 766 (2008). It does not – as portions of the lower court's *en banc* decision and Respondent Mesa assert[3] – formalistically require the plaintiff to establish that the victim had a "significant voluntary connection" to the United States. *Id.*; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275-78 (1990) (Kennedy, J., concurring). Rather, the functional approach requires the Court to consider together several factors: the relationship of

[3] Brief of Jesus Mesa, Jr. in Opposition to Petition for a Writ of Certiorari at 10-11; *Hernandez v. United States*, 785 F.3d 117, 122 (5th Cir. 2015) (en banc) (Jones, J., concurring).

the victim to the United States, the location of the relevant acts, any practical impediments associated with enforcing the right extraterritorially, and the importance of the right at stake – which in this case involves life itself.

A. *Boumediene* Requires a Functional Approach to the Extraterritorial Application of Constitutional Rights in This Case

In *Boumediene v. Bush*, this Court explained that the enforcement of constitutional rights rests not on the nationality of the victim or territorial boundaries, but on functional considerations. *See* 553 U.S. at 755-66. "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject to 'such restrictions as are expressed in the Constitution.'" *Id.* at 765 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)). The scope of these constitutional restrictions is not determined by formal Nineteenth Century categories of territorial sovereignty, but by a "functional approach" that takes into account the "practical obstacles" to the enforcement of a particular restriction in a particular location. *Id.* at 764, 766. In an era when governmental power routinely transcends geographic boundaries, the functional approach seeks to reconcile respect for fundamental constitutional values with the constraints that external conditions sometimes place on strict application of constitutional guarantees.

The Court held in *Boumediene* that noncitizens captured in foreign countries and detained as "enemy combatants" at the Guantanamo Bay Naval Base in Cuba were constitutionally entitled to challenge, by writ of habeas corpus, the legality of their detention. *Id.* at 770. In doing so, the Court refused to give effect to a congressional statute that provided these noncitizens less judicial review than the Constitution required. *Id.* at 787-92.

The *Boumediene* decision, in which a unified majority joined, clarified the meaning and limits of earlier holdings about the extraterritorial application of constitutional rights, drawing upon elements of prior fragmented Court decisions. In particular, the Court adopted the analysis of the concurring Justices Harlan and Frankfurter in *Reid v. Covert*, 354 U.S. 1 (1957), and Justice Kennedy in *United States v. Verdugo-Urquidez*, which turned on whether, after review of the facts and context, affording a particular constitutional right extraterritorially would be "impracticable and anomalous." *See Boumediene*, 553 U.S. at 759-60 (quoting from Justice Harlan in *Reid v. Covert* and Justice Kennedy in *Verdugo-Urquidez*). In *Reid*, the Court found inadequate justification for denying spouses of U.S. servicemembers their Fifth and Sixth Amendment rights to grand jury indictment and jury trial in U.S. proceedings abroad for allegedly murdering their husbands at military installations overseas. *See* 354 U.S. at 40-41. The *Boumediene* Court cited with approval Justice Harlan's reliance on the "particular circumstances, the practical necessities, and the possible

alternatives which Congress had before it" in determining whether the constitutional provisions could be applied. *See* 553 U.S. at 759-61. Likewise, in *Verdugo-Urquidez*, in which the Court upheld the warrantless search by U.S. agents of the home in Mexico of an alleged druglord, Justice Kennedy's opinion rested upon the practical impact of applying extraterritorial limits on cooperative law enforcement abroad. *See* 494 U.S. at 278 (Kennedy, J., concurring). In tying together these functional considerations, the *Boumediene* decision rejected simplistic reliance on status distinctions – such as citizenship and *de jure* sovereignty – as a means of determining whether constitutional protections applied to noncitizens in foreign locations.

Boumediene's reliance on functionalism is further confirmed by its discussion of the World War II-era decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which denied habeas corpus to convicted war criminals in an Allied prison in occupied Germany. *See Boumediene*, 553 U.S. at 762. The *Boumediene* Court characterized *Eisentrager* as a decision that rested on specific practical considerations relevant to its time and place – namely, the difficulties of providing a habeas corpus proceeding to enemy aliens during the post-war military occupation – and rejected the "formalistic, sovereignty-based" interpretation of *Eisentrager* advanced by the Government. *Id.* at 762-64. The Court reiterated its earlier insistence in *Rasul v. Bush*, 542 U.S. 466, 475-76 (2004), that the denial of rights in *Eisentrager* depended on the particular situation of the

convicted war criminals in that case, "not formalism." *Boumediene*, 553 U.S. at 764.

The functional approach to the extraterritorial applicability of constitutional rights requires courts to assess the context of the government or government agent's action, including at least three types of factors: the circumstances of the person whose rights are at issue, the location of relevant events, and the practical obstacles to the application of the constitutional right. For the particular right at issue in *Boumediene*, for example, the Court focused on:

> (1) the citizenship *and* status of the detainee *and* the adequacy of the process through which that status determination was made; (2) the nature of the *sites* where apprehension *and then* detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Id. at 766 (emphasis added). Thus, the Court's decision did not turn simply on whether the individuals whose rights were at issue were citizens or noncitizens, nor did it demand as a prerequisite for constitutional protection proof of any voluntary connection between the individual and the United States or its territory. Indeed, there was no dispute that the petitioners in *Boumediene* were noncitizen prisoners brought to the naval base against their will.

The *Boumediene* Court's decision emphasizes that under the functional test, the inquiry is fact-specific. Because constitutional limits are intended to restrict

government misconduct rather than merely divert it to specific locations, the Court considered more than one relevant location as contributing to the analysis. It considered the locations of the detainee's capture and his detention. *See id.* at 766-69. It also treated the "nature" of these "sites" as potentially varying in time. The Court did not simply distinguish between locations within or outside U.S. territory to determine the Constitution's application, or between foreign countries as a whole. The *Boumediene* Court's explanation of the unavailability of habeas corpus in *Eisentrager* focused with particularity on the situation of "Landsberg Prison, circa 1950." *Id.* at 768; *see also Reid*, 354 U.S. at 75 (Harlan, J., concurring in the result) (emphasizing the relevance of "the particular local setting, the practical necessities, and the possible alternatives"). The Court also indicated that the practical obstacles could vary with time as well as location, so that "if the detention facility were located in an active theater of war," the arguments against making the right available would have more weight. *Boumediene*, 553 U.S. at 770; *see also Reid*, 354 U.S. at 65 (Harlan, J., concurring in the result) (focusing on overseas court-martial "in times of peace"); *id.* at 45 (Frankfurter, J., concurring in the result) (limiting the question to "time of peace"); *id.* at 50-64 (Frankfurter, J., concurring in the judgment) (explaining that precedent upholding consular court trials in Japan must be understood in its particular historical context). Finally, the *Boumediene* Court emphasized the importance of the right at stake in assessing the extraterritorial application of rights. The Court stressed the "centrality" of habeas corpus,

characterizing it as "a right of first importance." *Boumediene*, 553 U.S. at 739, 798; *see also* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. Cal. L. Rev. 259, 273 (2009). Consideration of these factors is incompatible with a single-minded focus on voluntary connections.

The *Boumediene* decision thus makes clear that the functional approach applied by the concurring Justices Harlan and Frankfurter to the Fifth and Sixth Amendments in *Reid* and by Justice Kennedy to the Fourth Amendment in *Verdugo-Urquidez* governs the extraterritorial effect of the Fourth and Fifth Amendments. The Court's analytic approach in *Boumediene*, and the authorities it cited, were not limited to any particular setting or constitutional provision. Rather, as the Court concluded in no uncertain terms, the "common thread uniting" the Court's cases on the extraterritorial application of rights has been that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764.

B. The Plurality Opinion in *United States v. Verdugo-Urquidez* Does Not Provide Guidance for This Case

Respondent Mesa and the Fifth Circuit's *en banc* decision place inappropriate reliance on portions of Chief Justice Rehnquist's opinion that spoke only for himself and three other members of the Court in *United States v. Verdugo-Urquidez*. *See Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en

banc) (per curiam). Not only was the Chief Justice's opinion never controlling, but also its reasoning was implicitly repudiated by the Court in *Boumediene*, which applied a functional approach and which never cited the *Verdugo-Urquidez* plurality. Chief Justice Rehnquist's opinion thus does not provide the test for measuring extraterritorial application of rights, and it does not assist in resolving the present case.

The Court held in *Verdugo-Urquidez* that the Fourth Amendment did not limit a search by U.S. agents inside Mexico of the home of a nonresident alien. 494 U.S. at 274-75 (Rehnquist, C.J.); *id.* at 275 (Kennedy, J., concurring). Chief Justice Rehnquist's opinion offered a variety of explanations for this conclusion that, if controlling, would have severely limited the rights of noncitizens subjected to U.S. authority who had not established voluntary connections to the United States.

The Chief Justice's opinion was not, however, controlling. Although the opinion was nominally the Opinion of the Court, the fifth vote came from Justice Kennedy, whose own concurrence instead applied the functional approach that Justice Harlan (and Justice Frankfurter) had applied in *Reid v. Covert*, and that a majority of this Court later approved as controlling law in *Boumediene*. *Id.* at 275-78 (Kennedy, J., concurring); *cf. Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed

as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)); *Boumediene*, 553 U.S. at 759-60 (noting that Justice Harlan's and Justice Frankfurter's "votes were necessary to the Court's disposition" in *Reid*, and applying their practical approach). Justice Kennedy's narrower concurrence emphasized the unavailability of a warrant procedure for extraterritorial searches, the varying conceptions of privacy in other cultures, and the need for cooperation with foreign officials as reasons for limiting the reach of the relevant Fourth Amendment constraints. *See Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring). It did not adopt the plurality's broad, bright-line rule requiring "significant voluntary connections" as a prerequisite to the Constitution's protection. Indeed, contemporaneous analysis of the opinion by courts and commentators confirms that Chief Justice Rehnquist's opinion spoke for only a plurality. *See Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991); Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909, 972 (1991); *see also* Kal Raustiala, *The Geography of Justice*, 73 Fordham L. Rev. 2501, 2520 (2005).

Were there any doubt that Chief Justice Rehnquist's opinion lacked controlling effect, *Boumediene* resolved it. The decision rejected one of the fundamental propositions that Chief Justice Rehnquist had proffered – namely, that the Constitution generally requires a "significant voluntary connection" to the United States as a prerequisite for a noncitizen to enjoy constitutional rights. *Cf. Hernandez*, 785 F.3d at

133 (Dennis, J., concurring in part and concurring in the judgment) ("[T]he *Verdugo-Urquidez* view cannot be squared with the Court's later holding in [*Boumediene*] that 'questions of extraterritoriality turn on objective factors, and practical concerns, not formalism.'"). That element was obviously lacking in *Boumediene*, where there is no dispute the detainees had been brought to Guantanamo against their will. Nonetheless, the Court invalidated an act of Congress without any showing of a significant voluntary connection. Indeed, Justice Scalia, then the sole remaining member of the *Verdugo-Urquidez* plurality, recognized in dissent in *Boumediene* that the Chief Justice's opinion had not been adopted, and he criticized the majority's functional approach as inconsistent with a rigid status-based rule against extraterritorial rights for noncitizens. *See, e.g.*, 553 U.S. at 841-43 (Scalia, J., dissenting) (citing *Verdugo-Urquidez*).

The *Verdugo-Urquidez* plurality's "significant voluntary connection" requirement is inconsistent with not only *Boumediene* and Justice Kennedy's controlling concurrence in *Verdugo-Urquidez*, but also with courts' frequent application of constitutional protections to noncitizens who bear little or no connection to the United States. For example, the Due Process Clauses of the Fifth and Fourteenth Amendments do not make such connections a condition for constitutional protection – to the contrary, the *absence* of "minimum contacts" between a civil defendant and the United States (and to the particular forum State) provides the very reason why a U.S. court's exercise of

jurisdiction over the defendant would *violate* the Due Process Clause. *See, e.g.*, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879-81 (2011) (plurality opinion) (explaining why due process prohibits exercise of jurisdiction without minimum contacts); *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 330 (4th Cir. 2013); *Holland Am. Line, Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 459-61 (9th Cir. 2007).[4] Similarly, in criminal cases, the fact that defendants were involuntarily brought into the United States for prosecution does not affect their right to the constitutional protections governing criminal trials. *See Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring); *see also United States v. Robinson*, 843 F.2d 1, 4-8 (1st Cir. 1988) (Breyer, J.) (ex post facto clause); *United States v. Tinoco*, 304 F.3d 1088, 1096-1111 (11th Cir. 2002) (right to jury trial); *see also* Kal Raustiala, Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law 171-72 (2009) (explaining how making constitutional rights depend on

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[4] Courts of appeals have recognized that providing due process protections to foreign defendants would be inconsistent with the *Verdugo-Urquidez* plurality's "voluntary connections" requirement if, indeed, that requirement were the *sine qua non* of noncitizens' constitutional rights. *See, e.g.*, *GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 819 (D.C. Cir. 2012) (Williams, J., concurring); *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 n.* (D.C. Cir. 2005); *see also Aftam Exp. Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1362 (7th Cir. 1985) (making a similar point before *Verdugo-Urquidez*). Of course, no inconsistency arises if "voluntary connections" are not the *sine qua non* of noncitizens' constitutional rights, but rather one factor.

connections conflicts with established precedent and practice).

Under the functional approach to extraterritorial constitutional rights, the notion of "significant voluntary connections" might nonetheless remain a relevant consideration. For example, in *Ibrahim v. Department of Homeland Security*, 669 F.3d 983 (9th Cir. 2012), the Ninth Circuit harmonized the functional approach of *Boumediene* with the plurality opinion in *Verdugo-Urquidez* by treating "significant voluntary connections" as just one (neither necessary nor sufficient) factor to consider in determining a noncitizen's constitutional protection. *See id.* at 996-97. Similarly, the Second and Seventh Circuits considered a range of functional considerations in analyzing how the Fourth Amendment applied to searches of *citizens'* property abroad; they ultimately concluded that the reasonableness requirement applied but the Warrant Clause did not. *See, e.g., United States v. Stokes*, 726 F.3d 880, 890-93 (7th Cir. 2013); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 157, 170-72 (2d Cir. 2008). None of these decisions focused solely on status or "voluntary connections."

Respondent Mesa and the Fifth Circuit's concurring opinion thus wrongly treat the plurality opinion in *Verdugo-Urquidez* as if it expresses the general rule while *Boumediene* merely reflects some minor exception applicable only to the right to habeas corpus and only at Guantanamo. This view ignores Justice Kennedy's key concurring opinion in *Verdugo-Urquidez*. It ignores this Court's and lower courts' frequent

application of due process protections to noncitizen defendants, and it ignores this Court's specific instruction regarding the proper reading of *Johnson v. Eisentrager*. Indeed, the Fifth Circuit's analysis is a complete inversion of the constitutional analysis articulated by this Court in *Boumediene*. For reasons well explained by this Court, many factors other than the relationship between an individual and the United States may determine the applicability of the Fourth Amendment or other constitutional rights. Status is just one factor, considered along with other practical factors in analyzing the feasibility of applying a constitutional right abroad.

C. The Fourth Amendment Holding of *Verdugo-Urquidez* Is Also Inapplicable to the Fourth and Fifth Amendment Issues in This Case

Besides not being the controlling law, the facts and conclusion of the *Verdugo-Urquidez* plurality opinion are distinguishable from those presented here. Whatever precedential value the *Verdugo-Urquidez* decision retains after *Boumediene* is limited to the question of searches and seizures of a nonresident alien's property outside the United States. That is the issue identified by both the plurality and Justice Kennedy's concurrence as the subject of the Court's inquiry. *See Verdugo-Urquidez*, 494 U.S. at 261 (noting the question to be resolved in the plurality opinion's very first paragraph); *id.* at 278 (Kennedy, J., concurring).

Verdugo-Urquidez's analysis of the extraterritorial application of claims concerning interference with privacy and property rights is, on its face, plainly distinguishable from the issues presented in this case – namely the killing of a human being. *Verdugo-Urquidez* does not pose, let alone settle, the question of when a cross-border killing amounts to an arbitrary deprivation of life in violation of the Due Process Clause of the Fifth Amendment. This Court has also never considered *Verdugo-Urquidez* in a case involving the "seizure" of a person by killing or excessive use of lethal force. *Verdugo-Urquidez*'s facts related only to search and seizure of property. By contrast, the right to life is not subject to the varying expectations of privacy across cultures described in *Verdugo-Urquidez*; it is a universally recognized imperative. Whatever may be said about differing expectations of privacy in the home among different societies, the interest in not being killed is shared everywhere.[5] This case raises substantially different concerns about the nature of the right at issue, the consequences of its violation, the practicality of other alternatives, and the other factors addressed in Justice Kennedy's concurrence.

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[5] At the global level, restrictions on the use of lethal force are articulated in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and endorsed in General Assembly Resolution, 47th Sess., 69th plen. mtg., U.N. Doc. A/RES/45/166 (Dec. 18, 1990). These Basic Principles are a staple of international human rights monitoring. *See, e.g.*, U.N. Human Rights Comm., General Comm. No. 35, Article 9 (Liberty and security of person), ¶ 9, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

Thus, even if the cross-border use of deadly force by Respondent Mesa is viewed as an extraterritorial "seizure" within the meaning of the Fourth Amendment, an entirely separate analysis under the functional approach set forth in Justice Kennedy's concurrence would still be required. In sum, *Verdugo-Urquidez*'s consideration of the Fourth Amendment's application to a search inside Mexico of a noncitizen's home fails to address the Fourth and Fifth Amendments' application to the taking of a life at issue here.

II. The Functional Approach Requires Application of the Fourth and Fifth Amendments in This Case

The Fifth Circuit's *en banc* opinion mistakenly applied a formalistic analysis to the cross-border killing of Sergio Adrian Hernandez Guereca to assess whether he was entitled to extraterritorial application of the Fourth Amendment's protections.[6] Relying on

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[6] The Fourth and Fifth Amendments contain overlapping limits on unjustified deprivation of life. Under the Fourth Amendment, a killing that amounts to a "seizure" of the person may violate the guarantee against unreasonable searches and seizures. Under the Fifth Amendment, a killing may violate substantive due process limitations on the deprivation of life. This Court has made clear that when the Fourth Amendment applies and governs a case, courts should analyze the claim under the more specific Fourth Amendment standard rather than the more general Fifth Amendment standard, but that when the Fourth Amendment does not apply, Fifth Amendment analysis controls. *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). The same functional criteria provide the relevant factors for analyzing either the Fourth or Fifth Amendment versions of this right.

Verdugo-Urquidez, the Fifth Circuit concluded that Hernandez's survivors could not assert a claim under the Fourth Amendment because Hernandez was "a Mexican citizen who had no 'significant voluntary connection' to the United States . . . and who was on Mexican soil at the time he was shot[.]" *Hernandez*, 785 F.3d at 119.[7]

Had the Fifth Circuit instead followed the functional approach of *Boumediene*, its analysis would necessarily have considered other factors including Hernandez's particular characteristics, the locations of relevant events, and the practical obstacles to the application of the right. As this Court demonstrated in *Boumediene*, under the functional approach, the relevant factors should include the actions and rights at stake. *See* 553 U.S. at 798 (describing the right of habeas corpus as "a right of first importance"). In particular, the lower courts in this case should have considered the following factors:

Personal characteristics. Hernandez was a Mexican national. He was a vulnerable civilian only 15 years old. He was not armed or threatening harm when Agent Mesa shot him in the head.

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[7] The Fifth Circuit was divided on the question of whether Agent Mesa's conduct violated the Fifth Amendment. Ultimately, the court declined to reach the issue, relying instead on a qualified immunity analysis that has also been challenged in this case. *Hernandez*, 785 F.3d at 120; *see also id.* at 133 (Prado, J., concurring).

Locations of relevant events. In this case, the functional analysis takes into consideration both the location where the victim was killed and the location from which the shot was fired. Hernandez's killing took place in a cement culvert (the former course of the Rio Grande) that straddles the border between the United States and Mexico near the Paso Del Norte Port of Entry, one of four international ports of entry linking El Paso, Texas, with Ciudad Juarez, Chihuahua, Mexico. As part of a children's game, Hernandez had advanced onto the U.S. portion of the culvert in order to touch the border fence that stands on higher ground. Minutes later Hernandez was killed while standing on the Mexican portion of the culvert. Agent Mesa had been patrolling the culvert on a bicycle, and he fired his weapon from inside U.S. territory, with access to institutional support to control the Mexican side of the border region.

Contrary to the Fifth Circuit's generic characterization of the events as occurring simply "across the border" or in "foreign territory," the functional approach would take into consideration these multiple locations and the specific characteristics of the border zone that runs through this binational metropolitan area. Several million Mexicans and several million Americans live in such border communities, many of whom cross the border daily due to jobs or family on the other side. As the Fifth Circuit panel had recognized on initial review, the U.S. Border Patrol also exercises an unusually high degree of control over the area of Mexico immediately across the formal

El Paso-Juarez border, including the heavy presence and regular activities by U.S. border authorities in Mexico. *See Hernandez v. United States*, 757 F.3d 249, 270 (5th Cir. 2014) ("Border Patrol agents are not representatives of a temporary occupational force. They are influential repeat players in a 'constant' border relationship."), *adhered to in part on reh'g en banc*, 785 F.3d 117. It is also relevant that the border is shared with an ally, with whom the United States is at peace.

Practical obstacles to the application of the right. Practical obstacles to the application of the right in this situation are difficult to find. Whether one considers the Fourth Amendment right against unreasonable deployment of lethal force in making a seizure, or the Fifth Amendment right against arbitrary deprivation of life, there is no apparent reason why U.S. law enforcement personnel acting in U.S. territory cannot refrain from killing civilians on the southern side of the border under the same principles that protect civilians on the northern side.

The functional approach, as *Boumediene* explains it, asks whether compliance with a constitutional command would be "impracticable and anomalous" in the relevant range of circumstances. It does not demand that the command be practicable always and everywhere, including in some hypothetical future war, before it can ever be applied extraterritorially. In short, Agent Mesa did not face the logistical problems that U.S. officials actually operating in foreign territory may confront, and which could create

practical obstacles to compliance with constitutional commands.[8]

There is also no practical obstacle limiting the Court's capacity to adjudicate this case fairly. Courts have adjudicated many instances of material harm inflicted on physically absent noncitizens through government acts performed within the United States as within the scope of their constitutional rights. *See, e.g.*, *Asahi Metal*, 480 U.S. at 116; *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 488-89 (1931) (finding a Fifth Amendment taking in the 1917 requisitioning of a contract for construction of two vessels); *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1308 n.6 (9th Cir. 1982); *Sardino v. Fed. Reserve Bank of N.Y.*, 361 F.2d 106 (2d Cir. 1966) (Friendly, J.).[9]

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[8] For that reason, it is not even clear that this case necessarily involves extraterritorial application of constitutional rights.

[9] In *Sardino*, Judge Henry Friendly wrote:

> The Government's second answer that 'The Constitution of the United States confers no rights on non-resident aliens' is so patently erroneous in a case involving property in the United States that we are surprised it was made. Throughout our history the guarantees of the Constitution have been considered applicable to all actions of the Government within our borders – and even to some without. *Cf. Reid v. Covert*. . . . This country's present economic position is due in no small part to European investors who placed their funds at risk in its development, rightly believing that they were protected by constitutional guarantees; today, for other reasons, we are still eager to attract foreign funds.

The importance of the right at stake. The right at stake here – the right to life – is fundamental and universal. "The intrusiveness of a seizure by means of deadly force is unmatched. The [individual's] fundamental interest in his own life need not be elaborated upon." *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). Here, the interest asserted is *the* bedrock constitutional guarantee not to be deprived of your life. These interests are heightened by the particular facts here: the killing of a defenseless teenager in his own home town.

* * *

Taken in combination, the facts discussed above weigh overwhelmingly in favor of the applicability of Fourth Amendment and Fifth Amendment protections against unjustified killing,[10] even without inquiring into the particular history of the victim and his "connections" to the United States.[11] Given the lack of

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361 F.2d at 111 (citation and footnote omitted). The case rejected on the merits a constitutional challenge to a regulation that prevented the transfer to Cuba of the proceeds of an insurance policy.

[10] Although each version should be applicable, a court would leave the substantive due process guarantee in the background if the Fourth Amendment right already provided protection.

[11] Agent Mesa's killing of Hernandez presents slightly different facts from the otherwise similar case of *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015) (appeal pending), which also involved a Border Patrol agent's killing of an unarmed teenager in a border community. The adjoining towns of Nogales, Arizona and Nogales, Mexico are separated only by a border fence, not a culvert, and the victim J.A. was walking on a city street when Agent Swartz shot him fatally from the Arizona side. The district court in *Rodriguez* found that J.A. did have "substantial voluntary

practical obstacles, refusing to apply the right would mean disregarding constitutional limits on extra-judicial killings by government officials solely because of the victim's nationality and the officer's choice of where and when to shoot.

CONCLUSION

The Fifth Circuit failed to apply a functional test that focuses on the facts of Mr. Hernandez's particular case, as required by this Court's analysis in *Boumediene* and the controlling opinion in *Verdugo-Urquidez*. The Fifth Circuit's approach, which rigidly focused on nationality and "voluntary connections," is inconsistent with these controlling precedents, which rejected the formalistic approach of the *Verdugo-Urquidez* plurality. For that reason, *Amici*

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connections" to the United States for Fourth Amendment purposes, given the interdependent character of the two towns, the proximity of his home to the border, and his close familial relations with his grandparents who lived in Nogales, Arizona. *See* 111 F. Supp. 3d at 1036.

While the *Rodriguez* case illustrates the variations in facts that the Border Patrol shootings raise, *Amici* submit that the lives of residents in these border communities should not depend on such particular personal details. Under the functional approach, the demonstration of prior voluntary connections may strengthen the claim to Fourth or Fifth Amendment rights, but it is not a *sine qua non* for constitutional protection against cross-border killing.

Constitutional Law Scholars respectfully urge this Court to reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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No. 15-118

IN THE

Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,
Petitioners,

vs.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Mexican citizen lacked Fourth Amendment protections.

2. Whether the court of appeals erred in concluding that any substantive-due-process right under the Fifth Amendment was not clearly established.

3. Whether the claim in this case may be asserted under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

This brief *amicus curiae* will address only Question 3.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the panel decision in the Fifth Circuit would have allowed the family of an alien with no ties

1. All parties have filed blanket consents to *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

to the United States, who was likely participating in an illegal alien smuggling operation, to force an agent of the Border Patrol into litigation over an incident that had already been investigated by the Department of Justice and found to be a use of force consistent with the policy and training of his agency. Such an unwarranted expansion of the dubious *Bivens* rule would chill the enforcement of America's border security, contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Petitioners are the parents of 15-year-old Sergio Adrian Hernández Guereca ("Hernández"). *Hernández v. United States*, 757 F. 3d 249, 255 (CA5 2014). The petitioners allege that Hernández, a citizen and resident of Mexico, and his friends were gathered on the Mexican side of a culvert located near the Paso del Norte Bridge in El Paso, Texas. *Ibid.*, and n. 1. They claim the teens were merely playing a game, running up and back down the incline of the culvert and touching the barbed wire fence that separates Mexico and the United States. *Id.*, at 255.

United States Border Patrol Agent Jesus Mesa, Jr. arrived at the scene and detained one of Hernández's friends. *Ibid.* Hernández ran and stood behind a pillar of the Paso del Norte bridge in Mexico to observe. *Ibid.* While standing in the United States, Agent Mesa fired his gun at Hernández, shot across the border and struck and killed Hernández. *Ibid.*

The U. S. Department of Justice investigated the incident and reached very different conclusions. At the time of the shooting, Hernández and his friends were human smugglers attempting an illegal border crossing. See Respondent Mesa's Brief on the Merits 1. While Agent Mesa attempted to detain Hernández's friend,

the teens hurled rocks at Agent Mesa at close range. *Id.*, at 2. See also *infra*, at 9, n. 6.

Petitioners sued Agent Mesa and others in Federal District Court claiming, among other contentions, that Agent Mesa was personally liable under *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971), for violating Hernández's rights under the Fourth and Fifth Amendments. *Hernández*, 757 F. 3d, at 255. The District Court dismissed all the claims against Agent Mesa. *Id.*, at 256. A divided panel of the Fifth Circuit affirmed in part and reversed in part. The panel majority found that (1) the Fifth Amendment applied outside the boundaries of the United States for the benefit of a noncitizen, *id.*, at 272; (2) the rule of *Bivens* should be extended to this new context, *id.*, at 277; and (3) that the conduct *alleged* by Hernández, a supposedly unprovoked shooting, should not qualify for qualified immunity. See *id.*, at 279-280.[2] The panel therefore reversed the dismissal of the Fifth Amendment claim against Agent Mesa.

The Fifth Circuit reheard the case en banc and in a *per curiam* opinion affirmed the district court judgment of dismissal in its entirety. *Hernández* v. *United States*, 785 F. 3d 117, 121 (CA5 2015). The en banc court was unanimous that extraterritorial application of the Fifth Amendment in these circumstances was not clearly established for the purpose of qualified immunity. See *id.*, at 120-121.

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2. It bears emphasis at this point that this is a mere allegation, not by any means a fact. Cases such as this involve real people with reputations at stake, and opinions should designate allegation as allegations, not "assumed facts."

SUMMARY OF ARGUMENT

Judicially created implied causes of action for damages arising directly under the Constitution are a relic of the past. Thirty-seven years of this Court's precedents dictate that *Bivens* should be confined to its "precise circumstances." This case falls outside of *Bivens'* narrow scope because it involves a claim of undue force stemming from an act that occurred on foreign soil against a noncitizen with no connection to the United States. Creating a new implied cause of action is not an "automatic entitlement," and this Court has consistently refused to extend *Bivens* liability to new contexts or new categories of defendants.

Federal tort remedies are created by Congress, not the judiciary. Congress has not created a remedy for cross-border shootings by federal officials. Bedrock principles of separation of powers dictate that it is not within the purview of the judicial branch to create a cause of action that implicates foreign policy where one does not otherwise exist.

Special factors counsel against commissioning a new cause of action in the circumstances presented by this case. Congress, not the judiciary, is the proper political branch to decide if noncitizens can recover damages for tortuous government conduct occurring in a foreign country.

ARGUMENT

I. A judicially created implied cause of action for damages arising directly under the Constitution does not extend to claims arising in a foreign sovereign to a noncitizen with no connection to the United States.

A. Development of Bivens.

In *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 397 (1971), this Court created an implied private cause of action for damages against federal officials who allegedly violated an individual's constitutional rights while acting under color of federal law in his or her own capacity, despite the lack of express statutory or constitutional authority to do so. Webster Bivens alleged that several agents of the Federal Bureau of Narcotics entered his New York apartment without a warrant, "manacled" him in the presence of his wife and children, and conducted an exhaustive search of his premises. *Id.*, at 389.[3] Mr. Bivens alleged he was arrested and transported to the federal courthouse in Brooklyn where he was interrogated, booked, and strip searched. *Ibid.* Despite the availability of state tort law remedies, Mr. Bivens filed suit in Federal District Court against the narcotics agents for the violation of his Fourth Amendment rights and sought money damages from each of them individually. *Id.*, at 389-390.

Noting the general principle that persons who have been injured should have a remedy, and finding "no special factors counselling hesitation in the absence of affirmative action by Congress[,]" *id.*, at 396, this Court found that Mr. Bivens was "entitled to redress his

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3. Because the case was dismissed pretrial, these are allegations, not facts.

injury through a particular remedial mechanism normally available in the federal courts" if he could demonstrate that the federal agents violated his Fourth Amendment rights. *Id.*, at 397 (citing *J.I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964)).

Several years later, this Court was asked if *Bivens'* implied cause of action and damages remedy under the Fourth Amendment can also be implied directly under the Due Process Clause of the Fifth Amendment. *Davis* v. *Passman*, 442 U. S. 228 (1979). In that case, Ms. Davis brought suit against then-Congressman Passman alleging his conduct discriminated against her on the basis of her sex in violation of the Equal Protection component of the Due Process Clause. *Id.*, at 230, 235. This Court again looked at the lack of express prohibition by Congress on the subject and utilized its broad remedial authority to "use any available remedy to make good the wrong done" thus permitting Ms. Davis to proceed with her employment discrimination claim. *Id.*, at 245-248 (quoting *Bell* v. *Hood*, 327 U. S. 678, 684).

Soon after *Davis* was decided, this Court was again asked if a *Bivens*-type cause of action and remedy could be implied against federal prison officials who allegedly failed to provide medical attention to an asthmatic prisoner in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. *Carlson* v. *Green*, 446 U. S. 14, 16, and n. 1 (1980). By this point, this Court assumed that *Bivens* established a general rule that tort claimants have the right to bring a cause of action and recover damages against federal officials who violated their constitutional rights

unless an exception applies. See *id.*, at 18-19.[4] "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Ibid.* This Court limited the right, however, by laying out two situations that may defeat a *Bivens* action:

> "The first is when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.' [Citations.] The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id.*, at 18-19.

Finding that neither situation applied, this Court again permitted the claim to proceed.[5] See *id.*, at 19-23.

After *Carlson*, it appeared as if a *Bivens*-type cause of action and remedy would be routinely applied to nearly all alleged constitutional violations by a federal agent. However, starting with *Bush* v. *Lucas*, 462 U. S. 367 (1983), this Court began its retreat from the doctrine and has steadily declined to fashion an implied constitutional damages remedy to any other new context that has come to this Court's attention. In that case, a federal employee claimed a federal employer demoted him in violation of the First Amendment. See *id.*, at 369-370. The Court declined to create a new remedy without statutory authority for this situation.

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4. "Today we are told that a court must entertain a *Bivens* suit unless the action is 'defeated' in one of two specified ways." *Id.*, at 26 (Powell, J., concurring in the judgment).

5. This Court also held that such claims survive the victim's death. *Id.*, at 25.

Id., at 390. The Court has continued that retreat to the present day. See *Chappell* v. *Wallace*, 462 U. S. 296, 297 (1983) (claim by military servicemen that military officers violated various constitutional rights); *United States* v. *Stanley*, 483 U. S. 669, 671 (1987) (military soldier secretly given LSD by government while in military to study the effects of the drug on humans claimed violation of various constitutional rights); *Schweiker* v. *Chilicki*, 487 U. S. 412, 414 (1988) (claim of denial of benefits by Social Security disability benefit recipients violated the Fifth Amendment); *FDIC* v. *Meyer*, 510 U. S. 471, 484 (1994) (suit against federal agency rather than federal agent); *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 70-71 (2001) (prisoner sued a private corporation that operated a half-way house under a contract with the federal Bureau of Prisons for injuries sustained there in violation of the Eighth Amendment); *Wilkie* v. *Robbins*, 551 U. S. 537, 561-562 (2007) (landowner claimed government officials unconstitutionally interfered with his property rights in violation of the Fifth Amendment Takings Clause); *Minneci* v. *Pollard*, 565 U. S. 118, 126 (2012) (a prisoner's Eighth Amendment claims against private prison employees).

In this case, the first question that must be addressed is whether the Petitioners' claims against Agent Mesa are encompassed by this Court's prior holdings in *Bivens*, *Davis*, or *Carlson*. Because *Davis* involved a Fifth Amendment employment discrimination claim and *Carlson* involved an Eighth Amendment cruel and unusual punishment claim, those two cases are factually and legally distinguishable and need not be analyzed any further.

Thus, the inquiry turns to whether Petitioners' claims fall within *Bivens*' narrow scope. Thirty-seven years of this Court's precedents indicate that *Bivens*

should be confined to its "precise circumstances." *Malesko*, 534 U. S., at 75 (Scalia, J., concurring). Thus, if this case is to be encompassed within its familiar context and therefore permit a similar judicially created remedy, it must be sufficiently analogous in order to proceed without further analysis. It is not.

Bivens involved a claim of unannounced, unprovoked intrusion into a U. S. citizen's private residence within the United States borders. Mr. Bivens alleged that despite the lack of probable cause, federal officers restrained him, threatened him and his family, and searched his private dwelling from "stem to stern." *Bivens*, 403 U. S., at 389. He was then arrested, strip searched, interrogated, and jailed. The narcotics agents were acting on their own authority in response to Bivens' "alleged narcotics violations." *Ibid*. This case, on the other hand, involves a federal border patrol agent who allegedly used excessive force in violation of the Fourth Amendment when he shot and killed a Mexican citizen in Mexico who had no ties to the United States.[6] Here, Agent Mesa was reacting to the circum-

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6. Neither criminal nor federal civil rights charges were pursued against Agent Mesa:

> "The Justice Department conducted a comprehensive and thorough investigation into the shooting, which occurred while smugglers attempting an illegal border crossing hurled rocks from close range at a CBP agent who was attempting to detain a suspect. . . . This review took into account evidence indicating that the agent's actions constituted a reasonable use of force or would constitute an act of self defense in response to the threat created by a group of smugglers hurling rocks at the agent and his detainee. . . .
>
> "The Justice Department also concluded that no federal civil rights charges could be pursued in this matter. Under the applicable civil rights statutes, prosecutors must establish, beyond a reasonable doubt, that a law enforcement officer willfully deprived an individual of a constitutional right,

stances presented to him at the moment.[7] Even though both this case and *Bivens* involve Fourth Amendment claims, see *Graham* v. *Connor*, 490 U. S. 386, 395 (1989) (excessive force claims analyzed under the Fourth Amendment), the facts giving rise to this case and the circumstances and context in which this case arose are "fundamentally different," see *Malesko*, 534 U. S., at 70, and are miles apart from *Bivens*. Thus, further analysis is necessary.

B. Implied Causes of Action Are Disfavored.

Because the circumstances of this case do not fall within *Bivens'* narrow reach, the question thus turns to whether this Court should create a new, implied cause

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meaning with the deliberate and specific intent to do something the law forbids. This is the highest standard of intent imposed by law. Accident, mistake, misperception, negligence and bad judgment are not sufficient to establish a federal criminal civil rights violation. After a careful and thorough review, a team of experienced federal prosecutors and FBI agents determined that the evidence was insufficient to prove, beyond a reasonable doubt, that the CBP agent acted willfully and with the deliberate and specific intent to do something the law forbids, as required by the applicable federal criminal civil rights laws." U. S. Dept. of Justice, Office of Public Affairs, Federal Officials Close Investigation into Death of Sergio Hernández-Guereca, Press Release (Apr. 27, 2012), https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-Hernández-guereca (as visited December 29, 2016).

7. We are neither advocating for nor defending against Agent Mesa's actions in this case. Split-second decisions made by law enforcement officers in the heat of the moment are not subject to our second-guessing. Whether Agent Mesa's actions involved something more sinister is unknown and within the purview of the U. S. Department of Justice to assess and determine if criminal charges should be pursued. We are simply advocating for the halt of the creation of new causes of action without congressional authorization.

of action for an alleged "constitutional tort" committed on foreign soil against a noncitizen with no ties to the United States. See *Wilkie*, 551 U. S., at 549 ("The first question is whether to devise a new *Bivens* damages action").[8]

> "[A]ny free standing damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified." *Id.*, at 550.

In *Bivens,* this Court acknowledged that Congress had neither explicitly authorized nor prohibited the recovery of money damages from federal agents who violated an individual's Fourth Amendments rights. 403 U. S., at 396-397. Furthermore, even though "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation," in *Bivens*, this Court created a remedy nonetheless. *Id.*, at 396. This Court stated that because historically the invasion of personal liberty interests were remedied monetarily[9], and that it was " 'well settled that where legal rights have been

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8. Should this Court decide that the claim in this case may not be asserted under *Bivens*, it need not reach the constitutional questions raised by the Petitioners and supporting *Amici*. "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander* v. *Tennessee Valley Auth.*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring).

9. The historical remedy was a civil action in trespass, see Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 786 (1994), which would be brought in state court under state tort law.

invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' " *Ibid.* (quoting *Bell* v. *Hood*, 327 U. S. 678, 684 (1946)).

Judicially implied private causes of action were more freely created during the *Bivens* era because this Court was operating under the theory that " 'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute." *Alexander* v. *Sandoval*, 532 U. S. 275, 287 (2001) (quoting *J.I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964)). This view has since been "abandoned" by this Court. See *Malesko*, 534 U. S., at 67, n. 3 (quoting *Alexander*). No longer will this Court recognize the practice of creating implied causes of action to enforce federal rights. See *Stoneridge Inv. Partners* v. *Scientific Atlanta, Inc.*, 552 U. S. 148, 164-165 (2008). "Since our decision in *Borak*, we have retreated from our previous willingness to imply a cause of action where Congress has not provided one. . . . [a]nd have repeatedly declined to 'revert' to 'the understanding of private causes of action that held sway 40 years ago.' " *Malesko*, 534 U. S., at 67, n. 3 (quoting *Alexander*, 532 U. S., at 287).

This Court's reluctance to "revert" to the era of creating implied causes of action to enforce constitutional rights is evident in the cases that have come to this Court's attention after *Carlson*. *Minneci*, 565 U. S., at 124-125. "Since *Carlson*, we have consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U. S., at 68; see also *Ashcroft* v. *Iqbal*, 556 U. S. 662, 675 (2009).

> "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional

> prohibition. . . . [W]e have abandoned that power to invent 'implications' in the statutory field, . . . [and] [t]here is even greater reason to abandon it in the constitutional field, since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress." *Malesko*, 534 U. S., at 75 (Scalia, J., concurring.)

The context in which this case arose is unlike any other that has come before it. Here, a group of Mexican citizens were gathered on the Mexican side of the U. S.-Mexico border. *Hernández* v. *United States*, 757 F. 3d 249, 255 (CA5 2014). The exact facts that led to the shooting death of Hernández are unclear. The Mexican teens were either playing a "harmless" game of "tag the barbed-wire border fence," *ibid.*, or were involved in a much more perilous illegal border smuggling operation, see *supra*, at 9, n. 6, an activity that the Border Patrol has a duty to stop. Regardless, the factual circumstances undoubtedly present an entirely new context bearing no similarity to *Bivens*. It involves a claim of undue force stemming from an act that occurred on foreign soil against a noncitizen who had no connection to the United States.[10] This Court's precedents dictate against creating a new implied cause of action under these circumstances. *Schweiker*, 487 U. S., at 421 ("Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts").

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10. Petitioners raised claims under both the Fourth and Fifth Amendments. *Id.*, at 267-268.

II. Special factors heavily dictate against creating a new cause of action.

> "[T]he decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. [Citation.] But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Wilkie* v. *Robbins*, 551 U. S. 537, 550 (2007) (quoting *Bush* v. *Lucas*, 462 U. S. 367, 378 (1983).)

In regard to the first question of whether any alternative remedial scheme exists, in Petitioners' initial complaint, they asserted eleven claims against the United States, Agent Mesa, and other unknown federal employees. *Hernández*, 757 F. 3d, at 255. Seven claims were brought under the Federal Tort Claims Act (FTCA), 28 U. S. C. §§ 1346(b)(1), 2671-2680, and one claim was invoked under the Alien Tort Statute (ATS), 28 U. S. C. § 1350. *Hernández*, 757 F. 3d, at 255. When *Bivens* was decided, the FTCA did not provide a remedy for torts committed by federal law enforcement officials. The statute was amended in 1974 to allow plaintiffs to seek damages from the United States for certain torts committed by federal employees. See 28 U. S. C. § 2680(h), Pub. L. 93-253, § 2, 88 Stat. 50 (1974); see also S. Rep. 93-588, 1974 U. S. Code Cong. & Admin. News 2789.

"The FTCA 'is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment.' " *Hernández*, 757 F. 3d, at 257 (quoting *United States* v. *Orleans* 425 U. S. 807, 813 (1976)). However, Congress expressly limited this waiver of sovereign immunity when it excepted "[a]ny claim arising in a foreign country." 28 U. S. C. § 2680(k); *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 700 (2004). Thus, the Fifth Circuit correctly held that the Petitioners are precluded from seeking relief under the FTCA. See 757 F. 3d, at 258.

Furthermore, under the ATS, "[t]he district courts shall have original jurisdiction of any civil action brought by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. § 1350; *Kiobel* v. *Royal Dutch Petroleum, Co.*, 569 U. S. __, 133 S. Ct. 1659, 1663, 185 L. Ed. 2d 671, 679 (2013). The ATS confers statutory jurisdiction only and does not expressly create or authorize a cause of action. *Sosa*, 542 U. S., at 724. Rather, it allows federal courts to recognize private causes of action for a limited number of torts that violate international law. *Ibid.* In *Kiobel*, this Court held that "the presumption against extraterritoriality applies to claims under the ATS" and a "case seeking relief for violations . . . occurring outside the United States is barred." 133 S. Ct., at 1669, 185 L. Ed. 2d, at 685-686. Thus, similar to the FTCA, the tortious conduct must occur within the United States borders.

Bedrock principles of separation of powers dictate that it is "Congress's role, not the Judiciary's, to create and define the scope of federal tort remedies." *Meshal* v. *Higgenbotham*, 804 F. 3d 417, 429 (D.C. Cir. 2015) (Kavanaugh, J., concurring). Congress has deliberately

and expressly excepted the recovery of monetary relief for torts occurring in a foreign country. Petitioners and *Amicus* Sisk argue that because Petitioners are precluded from bringing a statutory cause of action under these circumstances, *Bivens* is the only method in which the Hernández family can obtain relief. Specifically, Professor Sisk states that "[a]micus writes to emphasize one important threshold consideration in resolving the *Bivens* question: the unavailability of an alternative, existing process for protecting the constitutionally recognized interest asserted by petitioners here." Brief for Professor Gregory C. Sisk as *Amicus Curiae* 3.

Putting to one side our disagreement over whether Hernández possessed a "constitutionally protected interest," this Court has explicitly stated that the absence of an alternative remedial scheme is simply one factor the court examines in its overall *Bivens* analysis. See *Wilkie*, 551 U. S., at 550 ("But even in the absence of an alternative [avenue for relief], a *Bivens* remedy is a subject of judgment").

There is no escaping the fact that Congress prohibits monetary recovery for tort claims against the Government that arise in a foreign country due to federal official misconduct. That alone should speak volumes to this Court and should heavily influence whether "special factors" counsel against commissioning a new cause of action in the circumstances presented by this case. Congress has not created a remedy for cross-border shootings by federal officials. But, it has expressly prohibited recovery for tort claims that arose in a foreign country. Congress has the authority to indicate whether it intends federal law to apply to conduct occurring abroad. See *Kiobel*, 569 U. S. __, 133 S. Ct., at 1665, 185 L. Ed. 2d, at 681. It is not up to the judicial branch to create a cause of action that impli-

cates foreign policy where one does not otherwise exist. See *Meshal*, 804 F. 3d, at 420 ("federal tort causes of action are ordinarily created by Congress, not by the courts").

> " 'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf. [Citation.] And Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Wilkie*, 551 U. S., at 562 (quoting *Bush*, 462 U. S., at 389).

Furthermore, matters involving foreign policy are the "province and responsibility of the Executive" and judicial intrusion is circumspect absent Congressional authority. *Department of the Navy* v. *Egan*, 484 U. S. 518, 529 (1988) (quoting *Haig* v. *Agee*, 453 U. S. 280, 293-94 (1981)).

In *Chappell* v. *Wallace*, 462 U. S. 296 (1983) and *United States* v. *Stanley*, 483 U. S. 669 (1987), this Court was asked to extend *Bivens* to constitutional torts sustained by soldiers in the course of their military service. In both cases, this Court refused to intrude upon the Congressional and Executive authority over military affairs despite the lack of a "viable cause of action under state or federal law, and no effective remedy from any alternate federal system." Kent, Are Damages Different?: *Bivens* and National Security, 87 S. Cal. L. Rev. 1123, 1151 (2014).

In *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 274-275 (1990), this Court held that the Fourth Amendment does not apply to searches and seizures by United States agents of property located in Mexico and owned by a Mexican citizen. The Court noted that "history

and case law [are] against" such application. *Id.*, at 273. In addition,

> "[t]he United States frequently employs armed forces outside this country — over 200 times in our history — for the protection of American citizens or national security. [Citations]. Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Id.*, at 273-274.

Although *Verdugo-Urquidez* did not involve a *Bivens* claim, this Court stated in dicta that if it were to find that the Fourth Amendment applied extraterritorially in the circumstances presented in that case, then "aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters." *Id.*, at 274 (citing *Bivens*). This Court further stated that "[p]erhaps a *Bivens* action might be unavailable in some or all of these situations due to 'special factors counseling hesitation,' [citations], but the Government would still be faced with case-by-case adjudications concerning the availability of such an action." *Ibid.*

Special factors heavily dictate against implying a new cause of action to the facts presented in this case. This Court should continue its retreat from implying private causes of action directly under the Constitution, continue to limit *Bivens*, *Davis*, and *Carlson* to those specific circumstances, and follow the precedent announced in *Sosa*, *Kiobel*, and *Verdugo-Urquidez*. Congress, not the judiciary, is the proper branch to decide if noncitizens can recover damages for tortuous government conduct occurring in a foreign country.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

January, 2017

Respectfully submitted,

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AND
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Supreme Court of the United States

JESUS C. HERNANDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* FORMER OFFICIALS OF U.S. CUSTOMS AND BORDER PROTECTION AGENCY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are former high-level officials of the U.S. Customs and Border Protection (CBP) Office of Internal Affairs. CBP is a subagency of the Department of Homeland Security that oversees the law enforcement organizations that control our nation's ports of entries and borders, including the U.S. Border Patrol. The Office of Internal Affairs (OIA) is responsible for preventing, detecting, and investigating instances of misconduct, corruption, and use of excessive force by CBP agents and officers. *Amici* respectfully submit this brief to provide the Court with information about CBP and the Border Patrol relevant to the questions presented here.

Amicus James F. Tomsheck served as the Assistant Commissioner of the CBP Office of Internal Affairs from June 2006 to June 2014. In that capacity, Mr. Tomsheck oversaw CBP's integrity departments, including offices that investigate instances of corruption, misconduct, and the use of lethal force by CBP agents and officers. Mr. Tomsheck managed CBP's relationships with federal investigative partners such as the Federal Bureau of Investigation, the Department of Homeland Security Office of Inspector General, and the Immigration and Customs Enforcement (ICE) Office of Professional Responsibility with regard to integrity related investigations. He also

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

served as CBP's Chief Security Officer and Senior Component Accountable Official. In those roles, he oversaw the pre-employment polygraph program and managed audits of CBP that were conducted by other government agencies. Following retirement, Mr. Tomsheck also served as a subject matter expert for the Homeland Security Advisory Council, CBP Integrity Advisory Panel, discussed *infra* at 5, 19. Prior to CBP, Mr. Tomsheck was a police officer for the City of Omaha from 1974 to 1983. He served as a Special Agent for the United States Secret Service from 1983 to 2006, and was a Deputy Assistant Director of the Secret Service Office of Investigations from 2003 to 2006.

Amicus James Wong served as the Deputy Assistant Commissioner of the CBP Office of Internal Affairs from December 2008 to December 2011, assisting Mr. Tomsheck with all OIA functions discussed above. Prior to that position, he served as the Special Agent in Charge of the Dallas Field Office of the CBP OIA from December 2006 to December 2008, supervising the administrative and criminal investigations of CBP employees. He also served as the Associate Special Agent in Charge of the San Diego ICE Office of Professional Responsibility from March 2003 to December 2006, supervising the administrative and criminal investigations of ICE and CBP employees.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sergio Hernández should not have been killed. He was an unarmed teen who did not pose an imminent threat to the U.S. Border Patrol agent, Respondent Jesus Mesa, Jr., who shot him. But because of conditions within the Border Patrol, similar incidents will likely continue to occur if agents cannot be held accountable in civil suits.

Under the oversight of U.S. Customs and Border Protection (CBP), the Border Patrol is the law enforcement agency primarily responsible for detecting and preventing the illegal entry of persons across the United States' borders with Canada and Mexico. This position comes with great responsibility, as well as a vulnerability to misconduct and corruption. As security along the border has increased, criminal organizations seeking inroads into the United States have attempted to infiltrate the Border Patrol. And pre-hiring screening programs have been inadequate, leading the Border Patrol in some instances to hire actual cartel members as agents.

In addition, the Border Patrol has become increasingly militarized since 2001, with some agents comparing their role to that of the U.S. Marine Corps—even though the Border Patrol is not part of the military, and is instead a civilian law enforcement agency. Combined with inadequate field training on appropriate uses of force, these factors have led to an environment in which Border Patrol agents have unnecessarily employed lethal force on the U.S.-Mexico border.

When excessive force incidents occur, internal government investigations suffer from systemic problems. The agency with the most direct interest in the investigation—CBP—can only undertake an investigation if two other agencies decline. And agents maintain a culture of protectionism that thwarts investigations even when they are undertaken.

As for external accountability, the United States has never extradited a Border Patrol agent to stand trial in Mexico, and has itself prosecuted only one agent in a cross-border shooting. That sole prosecution was initiated three years after the incident, only after a district court refused to dismiss a civil suit against the agent responsible.

Without the possibility of civil liability, the unlikely prospect of discipline or criminal prosecution will not provide a meaningful deterrent to abuse at the border. It did not deter Respondent Mesa from shooting Petitioners' son. And it will not deter other Border Patrol agents from killing unnecessarily in future confrontations. For these reasons, *amici* respectfully support Petitioners' position that the Court reverse the judgment of the court of appeals and permit Petitioners' case to move forward.

ARGUMENT

I. The Use Of Excessive Force By Border Patrol Agents, Along With High Rates Of Corruption And Misconduct, Is A Consequence Of Increased Militarization And Inadequate Screening And Training.

A. The militarization of the Border Patrol contributes to improper use of force.

1. The United States has increasingly militarized the Border Patrol.

CBP was created in 2003 during the administrative reorganization following the attacks of September 11, 2001. Through the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002), Congress consolidated all border patrol and homeland security agencies into a new umbrella agency, the Department of Homeland Security (DHS). Within DHS, "most of the former U.S. Customs Service and the Border Patrol" merged into what is now CBP. Homeland Security Advisory Council, *Final Report of the CBP Integrity Advisory Panel* (Mar. 15, 2016), at 1, *available at* http://tinyurl.com/CBPFinal.

CBP is the largest civilian law enforcement agency in the country, with 44,000 law enforcement officers, 21,000 of whom are assigned to the U.S. Border Patrol. *See* Homeland Security Advisory Council, *Interim Report of the CBP Integrity Advisory Panel* (June 29, 2015) (hereinafter *CBP Integrity Advisory Panel, Interim Report*), at 13, *available at* http://tinyurl.com/CBPInterim. CBP is primarily

responsible for securing the nation's borders. Within CBP, the Border Patrol's "mission is to detect and prevent the illegal entry of aliens." *See* R. Chuck Mason, *Securing America's Borders: The Role of the Military*, Congressional Research Service (Feb. 25, 2013), at 1, *available at* http://tinyurl.com/MasonSecuring.

Since 2001, the United States "has invested over $100 billion in border and immigration control." Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, Politico Magazine (Nov./Dec. 2014), *available at* http://tinyurl.com/GraffGreen. From 2001 to 2011, the Border Patrol more than doubled its workforce, from 9,200 agents to over 21,000. *See id.* CBP also invested in significant upgrades to its surveillance and defense equipment. "[I]t has become entirely normal to look up into the Arizona sky and to see Blackhawk helicopters and fixed-wing jets flying by... [and to] hear Predator B drones buzzing... [that] are equipped with the same kind of 'man-hunting' [radar] that flew over the Dashti Margo desert region in Afghanistan." Todd Miller, *War on the Border*, N.Y. Times, Aug. 17, 2013, *available at* http://tinyurl.com/MillerWar. In addition, more than one-third of Border Patrol agents are former military personnel who served in Afghanistan and Iraq. Miller, *supra*.

Border Patrol agents are also granted powers that traditional law enforcement agencies do not have. For example, within 100 miles of the border, Border Patrol agents may conduct routine searches without reasonable suspicion and without complying with

"traditional warrant and probable cause requirements." Lori Johnson, *Preserving the Excessive Force Doctrine at Our Nation's Borders*, 14 Holy Cross J.L. & Pub. Pol'y 89, 90 (2010); Miller, *supra*. Agents operating in the border zone therefore "regularly board buses and trains and ask passengers for identification." Miller, *supra*.

Many agents also consider themselves the country's first line of defense, with some likening their role to the U.S. Marine Corps and vowing to "never surrender a foot of U.S. soil." Mark Binelli, *10 Shots Across the Border*, N.Y. Times, Mar. 3, 2016 (quoting James Wong), *available at* http://tinyurl.com/Binelli. This mindset has been reinforced by high-level DHS officials. In response to criminal organizations that had been "operating with near-impunity" at the border for years, "the strategy communicated [by former Secretary of Homeland Security, Michael Chertoff] to agents out in the field[] was clear: Fight back." Graff, *supra*. As a result, the Border Patrol's "mentality is everyone they encounter is a bad guy, which is totally different from other law enforcement." *Id.* (quoting W. Ralph Basham, CBP Commissioner from 2006 to 2009).

Yet CBP is a civilian law enforcement agency, not a part of the United States military. Indeed, the military is generally prohibited from "execut[ing] the domestic laws of the United States," including immigration laws. Mason, *supra*, at 3.

2. This militarization has led to excessive uses of force.

Traditional police practices permit the use of deadly force only where it is "*required* to compel compliance from a (willing or unwilling) subject," or is otherwise reasonably necessary as a response to a risk of death or serious bodily harm. Int'l Ass'n of Chiefs of Police, *Police Use of Force in America* (2001), at 14 (emphasis added), *available at* http://tinyurl.com/PoliceUse. For example, Federal Bureau of Investigations (FBI) "special agents may use deadly force only when necessary—when the agent has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the agent or another person." Fed. Bureau of Investigation, *What is the FBI's Policy on the Use of Deadly Force by its Special Agents?*, *available at* http://tinyurl.com/FBIAbout (last visited Nov. 28, 2016).

By contrast, "[i]n wartime, the function of the military is to kill the enemy." Kurt Andrew Schlichter, *Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations*, 26 Loy. L.A. L. Rev. 1291, 1309 (1993). Military rules of engagement provide that military personnel in combat "are under general orders not to identify themselves... and to respond to a perceived lethal threat by efficient destruction of the enemy." John Flock, *The Legality of United States Military Operations Along the United States-Mexico Border*, 5 Sw. J.L. & Trade Am. 453, 467 (1998).

The Border Patrol does not endorse the use of force protocols of military combat, and, indeed, is required to follow use of force rules that govern typical civilian law enforcement agencies. *See* 8 C.F.R. § 287.8(a). However, it does not always abide by those rules. This is most evident in response to rock throwing—a somewhat common occurrence at the border where individuals throw rocks at Border Patrol agents, sometimes to distract them from ongoing smuggling activities. *See* Binelli, *supra*.

At least through 2012, the Border Patrol had an unofficial practice of permitting Border Patrol agents to treat rock throwing as lethal force and to respond with lethal force, instead of taking cover or calling for backup. *See* Brian Bennett & Joseph Tanfani, *A Family Outing, Then a Deadly Border Patrol Shooting*, L.A. Times, Oct. 18, 2014, *available at* http://tinyurl.com/BennettTanfani. As stated by one senior DHS official, "[t]he agency has created a culture that says, 'If you throw a rock at me, you're going to get shot.'" Graff, *supra*.

DHS records show that Border Patrol agents responded to rock throwing with the use of a firearm in ten percent of cases in Fiscal Year 2011 and twelve percent of cases in Fiscal Year 2012. *See* DHS Office of Inspector General, *CBP Use of Force Training and Actions to Address Use of Force Incidents* (Redacted) (Sept. 2013) (hereinafter *DHS CBP Use of Force Training*), at 14-15, *available at* http://tinyurl.com/CBPUseOfForce. From 2010 to 2014, of the 24 cases where Border Patrol agents shot and killed individuals at the border, agents offered rock throwing as a justification for ten of them. Brian

Bennett, *Border Patrol Sees Little Reform on Agents' Use of Force*, L.A. Times, Feb. 23, 2015, *available at* http://tinyurl.com/BennettBorder.

CBP commissioned a study of these incidents in 2012. Pursuant to that directive, the Police Executive Research Forum (PERF), a nonprofit, nonpartisan research organization, reviewed 67 cases involving the use of force by CBP officers between January 2010 and October 2012. *See generally* Police Executive Research Forum, *U.S. Customs and Border Protection, Use of Force Review: Cases and Polices* (Feb. 2013), *available at* http://tinyurl.com/PERFCBPReport. PERF found that "in some cases agents put themselves in harm's way by remaining in close proximity to the rock throwers when moving out of range was a reasonable option." *Id.* at 6. In other instances, officers were safe inside their vehicles when the vehicles were hit by rocks, yet the officers still used lethal force against the rock throwers. *Id.* at 9. On the whole, PERF found that "[t]oo many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force." *Id.* at 6. In some instances, "frustration is a factor motivating agents to shoot at rock throwers." *Id.* at 9. Overall, PERF concluded that "[m]oving to a safer location when possible is preferable to using deadly force and such action should be considered as part of objective reasonableness." *Id.* at 7-8.

PERF also found that Border Patrol agents used deadly force when confronting suspicious vehicles, even when there was no indication that the driver or any passenger posed a threat. *Id.* at 8. PERF deduced that, in certain cases, agents would "intentionally put

themselves into the exit path of a vehicle, thereby exposing themselves to additional risk and creating justification for the use of deadly force." *Id.*

Instead of responding to PERF's report, which CBP had commissioned, CBP "tried to prevent the scathing 21-page report from coming to light," sending House and Senate oversight committees that requested copies "only a summary that omitted the most controversial findings." *See* Brian Bennett, *Border Patrol's Use of Deadly Force Criticized in Report*, L.A. Times, Feb. 27, 2014, *available at* http://tinyurl.com/Bennett20140227. The Los Angeles Times eventually obtained a copy of the full report and CBP's internal response, which "reject[ed] the two major recommendations: barring border agents from shooting at vehicles unless its occupants are trying to kill them, and barring agents from shooting people who throw things that can't cause serious physical injury." *Id.*

Only after the Los Angeles Times obtained the report did CBP update its use of force policies. The use of force policy now provides that agents "shall not discharge their firearms in response to thrown or launched projectiles unless the officer/agent has a reasonable belief... that the subject of such force poses an imminent danger of serious physical injury or death to the officer/agent or to another person." U.S. Customs and Border Protection, Office of Training and Development, *Use of Force Policy, Guidelines and Procedures Handbook* (May 2014), at 6, *available at* http://tinyurl.com/CBPHandbook.

B. CBP's failure to adequately screen and train new hires contributes to high rates of corruption, misconduct, and excessive force.

1. Inadequate pre-employment screening permitted unsuitable candidates to join the Border Patrol.

From 2006 to 2009, CBP hired over 11,000 new agents, including nearly 8,000 into the Border Patrol. *See DHS CBP Use of Force Training*, *supra*, at 3. Because of resource constraints, however, CBP was unable to match this hiring surge with adequate pre-employment background screening and training programs. When former Secretary of Homeland Security Michael Chertoff took office, his task was to double CBP's force within four years. Graff, *supra*. But "[f]rom an integrity issue, you can't grow a law enforcement agency that quickly," observed Robert Bonner, who was the Commissioner of CBP from its inception until 2005, just before the hiring surge began. *Id.*

Moreover, as the U.S. has bolstered border security, criminal organizations have increasingly relied on bribing U.S. agents and infiltrating the Border Patrol with sympathizers in order to maintain the flow of people and contraband across the border. *See* Andrew Becker, *Border Agency Report Reveals Internal Struggles with Corruption*, Center for Investigative Reporting (Jan. 29, 2013), *available at* http://tinyurl.com/BeckerCFIR. Thus, individuals with ties to

criminal activity applied for positions with the Border Patrol. *Id.*

The FBI requires all applicants for FBI employment to take pre-employment polygraph tests. *Id.* The tests "are used to identify past behavior (e.g., use of illegal drugs, involvement with foreign nationals) that may indicate a lack of reliability in the potential employee." U.S. Dep't of Justice, Office of the Inspector General, Evaluation and Inspections Division, *Use of Polygraph Examinations in the Department of Justice* (Sept. 2006), at 26, *available at* http://tinyurl.com/DOJPolygraph.

However, despite the fact that "the border region is considered the 'highest threat environment for government corruption,'" Graff, *supra* (quoting W. Ralph Basham, CBP Commissioner from 2006 to 2009), CBP in contrast administered pre-employment polygraph examinations to only 10 to 15 percent of new hires between 2006 and 2009. *See New Border War: Corruption of U.S. Officials by Drug Cartels: Hearing Before the Ad Hoc Subcomm. on State, Local and Private Sector Preparedness and Integration of the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong., S. Hrg. 111-649 (Mar. 11, 2010) (testimony of James Tomsheck). The results of the tests that were given were staggering. Of approximately 1,000 CBP applicants subject to polygraph examinations between 2006 and 2009, almost 60 percent were determined unsuitable for service, largely because they admitted during the examination to prior criminal activity, including violent crimes and involvement with drug cartels and smugglers. *See id.*; Michael S. Danielson, *Our Values*

on the Line: Migrant Abuse and Family Separation at the Border, Jesuit Conference of Canada and the United States (Sept. 2015), at 4-5, *available at* http://tinyurl.com/DanielsonMigrant.

Yet, even with these alarming results, CBP did not begin administering polygraph tests to all new hires until October 2012. *See DHS CBP Use of Force Training, supra*, at 21. CBP thus "regularly sent new agents through the academy and even out into the field before completing full background checks." Graff, *supra.*

2. Trainings failed to compensate for inadequate screening.

The shortcomings of CBP's screening process were exacerbated by inadequate training once agents were on the job. The rapid expansion of the Border Patrol force "dilut[ed]... the level of experience of the agents in the field." Chad C. Haddal, *Border Security: The Role of the U.S. Border Patrol,* Congressional Research Service (Aug. 11, 2010), at 33, *available at* http://tinyurl.com/Haddal. By mid-2007, the average agency-wide experience level of Border Patrol agents was four to five years, but the experience level in some units along the southwest border was only 18 months. *Border Patrol, Costs and Challenges Related to Training New Agents: Hearing Before the Subcomm. On Management, Investigations, and Oversight of the H. Comm. on Homeland Security and Justice,* 110th Cong., 2007 WL 1768394 (June 19, 2007) (statement of Richard M. Stana, Director, Homeland Security and Justice, Gov't Accountability Office).

The training program for new Border Patrol agents includes three components: "(1) basic training at the academy, (2) postacademy classroom training administered by the academy but conducted in the [field offices], and (3) field training conducted on the job in the [field offices]." *Id.* A review of the training program conducted by the Government Accountability Office (GAO) in 2007 found that basic training at the academy was effective, but the "challenge" was the field offices' "capacity to provide adequate supervision and training." *Id.* Because the Border Patrol did not have a "uniform field training program" or even uniform standards that field training programs were required to follow, it was difficult for new agents to "become proficient in the safe, effective, and ethical performance of their duties." *Id.* In addition, although the agency strived for a five-to-one agent-to-supervisor ratio in the field, "as of October 2006, the overall agent-to-supervisor ratio for southwest [field offices], where the Border Patrol assigns all new agents, ranged from about 7 to 1 up to 11 to 1." *Id.*

Despite the GAO's findings almost a decade ago, training deficiencies persist, especially with regard to use of force training. In 2013, the DHS Office of Inspector General (DHS-OIG) reviewed CBP's use of force trainings and audit program. *See generally DHS CBP Use of Force Training, supra.* The review noted that CBP audit teams had identified "several major issues" with use of force field trainings. *Id.* at 17. For example, the audit of at least one location revealed that "many agents and officers do not understand use of force and the extent to which they may or may not

use force." *Id.* More generally, audits revealed that many Border Patrol teams "were not giving written tests during less-lethal force recertification training, or were not using the correct course of fire for firearms qualifications." *Id.*

DHS-OIG further observed that, although CBP's audit program helped to identify areas for improvement in field training, "there is no formal process for [follow-up], [and] no system to assess results and make appropriate timely changes to use of force training." *Id.* In other words, even where CBP was able to identify deficiencies in its use of force training programs, there was no mechanism in place to correct them.

C. The Border Patrol workforce has been plagued by corruption, misconduct, and excessive force incidents.

In light of the Border Patrol's vulnerability to influence by criminal organizations and CBP's failure to adequately screen and train agents, corruption and misconduct have been prevalent among the Border Patrol's ranks. Between 2006 and 2008, CBP hired agents who had criminal histories or, even worse, joined the Border Patrol for criminal purposes. As former Commissioner of CBP, W. Ralph Basham—who oversaw hiring between 2006 and 2008—admitted, "[w]e found out later that we did, in fact, hire cartel members." Graff, *supra*.

Specifically, CBP uncovered "dozens" of instances where criminal organizations, such as Mexican cartels and street gangs, had infiltrated its ranks. *Id.*

For example, between 2008 and 2009, a CBP officer "coordinated with smugglers to allow loads of ecstasy to go unchecked through his lane at the San Luis Port of Entry in exchange for $33,000." Brady McCombs, *Border Corruption Cases Grow*, Arizona Daily Star, Aug. 16, 2011, *available at* http://tinyurl.com/McCombsBorder. Another Border Patrol agent took bribes from drug smugglers in exchange for maps of Border Patrol sensor locations. *Id.* And yet another was caught smuggling over 700 pounds of marijuana across the border in his CBP truck. *Id.*

According to Ronald Hosko, who served as the assistant director of the FBI's criminal investigative division from 2012 to 2014, CBP officials said that as many as 10 to 20 percent of CBP's workforce "had integrity problems." Graff, *supra*. And between 2004 and 2014, "roughly 170 CBP employees, including Border Patrol agents, [were] arrested or convicted on corruption-related charges," such as smuggling, money laundering, and conspiracy. Andrew Becker, *Border Agency's Former Watchdog Says Officials Impeded His Efforts*, Washington Post, Aug. 16, 2014, *available at* http://tinyurl.com/BeckerBorder; S. Hrg. 111-649, *supra* (testimony of James Tomsheck).

Arrests for general misconduct were much greater—from 2005 to 2012, approximately 2,170 CBP officers were arrested for offenses ranging from domestic violence to drunk driving. Graff, *supra*. In one particularly shocking incident, a border patrol agent in McAllen, Texas intercepted three Honduran women—a mother and her 14-year-old daughter, and another teenage girl—as they attempted to cross the Rio Grande Valley into the United States. *See* Graff,

supra. Instead of detaining them and bringing them to a holding center, however, he kidnapped, raped, and attempted to murder them. *Id.* Although "[t]he magnitude and horror of th[is] crime were unusual,... the potential perpetrator [was not]." *Id.* Indeed, "investigating assaults and misconduct among Border Patrol agents... had become the [local FBI] field office's top criminal priority." *Id.*

Reports on the use of excessive force are also common. From 2007 to 2012, DHS identified 1,187 allegations of excessive force at the hands of CBP agents. *See DHS CBP Use of Force Training*, *supra*, at 6-7. In a survey of individuals who had been deported from July 2014 to March 2015, more than one-third reported some form of abuse or mistreatment by Border Patrol agents while in DHS custody. Danielson, *supra*, at 13-14.

II. Inefficiencies And Cover-Ups Undermine The Effectiveness Of Government Investigations Into Use Of Force Incidents.

A. Internal investigations suffer from a serious structural flaw.

Conventional federal law enforcement internal affairs models place "the internal investigative function within the agency which bears the strongest institutional interest in deterring and detecting corrupt behavior." *CBP Integrity Advisory Panel, Interim Report*, *supra*, at 10 (citation omitted). For example, within the FBI, "the FBI's Inspection Division oversees the reporting and investigative phases of the disciplinary system." U.S. Dep't of

Justice, Office of the Inspector General, Evaluation and Inspections Division, *Review of the Federal Bureau of Investigation's Disciplinary System* (May 2009), at 2, *available at* http://tinyurl.com/DOJFBIReview.

With respect to reviews of alleged misconduct by CBP personnel, however, three offices under the umbrella of DHS share competing investigative authority. Pursuant to a management directive, DHS-OIG has the right of first refusal to investigate allegations of misconduct, corruption, or excessive force within CBP. *See CBP Integrity Advisory Panel, Interim Report, supra*, at 10. If DHS-OIG declines to investigate, the Immigration and Customs Enforcement Office of Professional Responsibility (ICE-OPR) can review the case. *See DHS CBP Use of Force Training, supra*, at 6. Only if both DHS-OIG and ICE-OPR decline, may the CBP Office of Internal Affairs undertake an investigation. *Id.*

The CBP Integrity Advisory Panel, commissioned by the Secretary of DHS to review CBP's efforts to deter corruption and use of excessive force, characterized this review process as suffering from a "serious structural problem." *CBP Integrity Advisory Panel, Interim Report, supra*, at 10. CBP has the most direct access to individuals and evidence relevant to investigations of its own employees, yet it is relegated to third-tier review. Moreover, prior to August 2014, the CBP Office of Internal Affairs did not even have the authority to review cases for possible criminal misconduct—it could review only for administrative violations. *See id.* at 7.

Even in instances where the Office of Internal Affairs can investigate a case that DHS-OIG and ICE-OPR have both declined, the relationship between the Office of Internal Affairs and DHS-OIG is "broken," *id.* at 10, and "[i]nformation sharing among the offices... [i]s minimal," Binelli, *supra*. Alan Bersin, who served as CBP Commissioner from 2010 to 2011, reflected that during his tenure, "[t]here was more than tension and friction.... There was outright confrontation." Graff, *supra*. The same is true of the relationship between DHS-OIG and the FBI. The assistant director of the FBI's criminal investigative division from 2012 to 2014, Ronald Hosko, lamented DHS-OIG's practice of fighting the FBI "at every turn," and the "deliberate attempt by senior people in DHS and in the inspector general's shop to avoid cooperating with the F.B.I." Binelli, *supra*.

Moreover, when the Office of Internal Affairs has investigated incidents, it has been rebuked from within. Confronted with one such investigation, a former Chief of the Border Patrol told *amici*: "This is not what we do. We manage this problem." *See Crossing the Line*, FullMeasure (Nov. 20, 2016), *available at* http://tinyurl.com/FMCrossing. By "managing" the problem, the former Chief meant the agency should seek to bureaucratically minimize the problem, and directed *amici* to change the agency's definition of "corruption" to encompass a smaller universe of conduct that would need to be reported to DHS. *Id.*

B. Internal investigations are hampered by agents concealing their colleagues' wrongdoing.

Investigations by all offices into Border Patrol corruption, misconduct, and abuse are hampered by agents' practice of covering for one another. Known widely as the "code of silence," or "Green Code," Border Patrol agents have an understanding that they will not "say anything which may incriminate another individual member of the same force, even when this member acted in flagrant violation of the law." Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 23 Immigr. & Nat'lity L. Rev. 451, 512-13 (2002) (emphasis omitted). Richard Skinner, the first Senate-confirmed Inspector General of DHS, put it this way: "Out in the field, there was a culture to keep things to themselves. You're familiar with 'What happens in Vegas stays in Vegas?' They had a 'What happens in the field stays in the field.'" Graff, *supra*.

Former Commissioner of CBP, Alan Bersin, commissioned a study by the Homeland Security Studies and Analysis Institute in 2011, "to evaluate the agency's countercorruption programs." Becker, *Border Agency Report Reveals, supra*. The nonpublic report found that "the 'code' presents an insidious challenge to workforce integrity, and requires explicit, targeted and sustained attention." *Id.* (quoting report). In August 2012, the former Deputy Commissioner of CBP told members of Congress during a hearing on border corruption that the agency had acted on some of the study's anticorruption recommendations, "[b]ut it remains unclear to what extent

the recommendations" of the Homeland Security Studies and Analysis Institute have been adopted. *Id.*

III. Incidents Involving The Questionable Use Of Lethal Force By Border Patrol Agents Have Resulted In No Discipline.

From 2005 to February 2014, CBP officers killed at least 45 people, including 13 Americans. *See Force at the Border*, Arizona Republic, *available at* http://tinyurl.com/AZRepublicForce (last visited Dec. 5, 2016) (database of deaths by CBP officers). At least eight victims since 2010 were on the Mexican side of the border when they were shot. *See* Bennett, *Border Patrol Sees Little Reform*, *supra*. However, from at least 2007 to 2014, "[n]ot a single Border Patrol agent... [was] disciplined for excessive use of force." Graff, *supra* (quoting James Wong).

In many incidents, significant discrepancies between the agents' reports and other accounts of the events reflect attempts to cover up or justify incidents. In nine of 24 cases resulting in death between 2010 and May 2012, "agents' accounts were contradicted by other witnesses or by other law-enforcement officers." Bob Ortega & Rob O'Dell, *Deadly Border Agent Incidents Cloaked in Silence*, Arizona Republic, Dec. 16, 2013, *available at* http://tinyurl.com/OrtegaODell. In some, video footage of the shootings specifically contradicted Border Patrol agents' accounts. *Id.*

For example, in 2010, Border Patrol agents and other CBP officers beat Anastacio Hernandez-Rojas and shot him with an electric taser five times. *See*

Brian Epstein, *Crossing the Line at the Border*, Need to Know on PBS (Apr. 20, 2012), *available at* http://tinyurl.com/EpsteinCrossing. A medical examiner, labeling the death a homicide, determined that the cause of death was a heart attack resulting from a "physical altercation with law enforcement officers." *Id.*

The agents justified their use of force by claiming that Hernandez-Rojas was combative and needed to be subdued. *Id.* But video footage showed that Mr. Hernandez-Rojas was handcuffed on the ground, surrounded by a dozen officers, and calling for help when he was beaten and tased. *Id.*; *see also* Ortega, *Deadly Border Agent Incidents Cloaked in Silence*, *supra*. As the district court in the ensuing civil case noted in denying the officers' motion for summary judgment, "[d]efendants contend that Anastacio was actively resisting arrest .... However, the video evidence submitted provides, at a minimum, that Anastacio was not resisting arrest or attempting to evade arrest." *Estate of Hernandez-Rojas ex rel. Hernandez v. United States*, 62 F. Supp. 3d 1169, 1182 (S.D. Cal. 2014). Moreover, "[t]he sheer number of officers available at the scene demonstrates rather strongly that there was no objectively reasonable threat to the safety of any one [sic] other than Anastacio." *Id.* Yet the agents were never disciplined and no criminal charges were brought. *See* U.S. Dep't of Justice, Office of Public Affairs, *Federal Officials Close the Investigation into the Death of Anastasio Hernandez-Rojas* (Nov. 6, 2015), *available at* http://tinyurl.com/DOJHernandez.

That same year, Border Agent Taylor Poitevent shot Juan Mendez, an 18-year-old U.S. citizen, twice in the back. *See* Andrew Becker, *2010 Border Patrol Fatal Shooting Comes Under Renewed Scrutiny*, Reveal (Aug. 1, 2014), *available at* http://tinyurl.com/Becker2010Border. The Department of Justice initially concluded that the shooting was justified based on information that Mendez got into a physical struggle with Poitevent. *See* Becker, *2010 Border Patrol Fatal Shooting*, *supra*. However, after Poitevent made conflicting statements in a civil lawsuit involving the incident, an Assistant U.S. Attorney who had been defending Poitevent in the civil suit began digging further. Interviews revealed that Luis Valderrama, a former Border Patrol agent who had been elevated to the CBP Office of Internal Affairs, may have coached Poitevent about what to say to avoid prosecution. *Id.* Although DHS-OIG opened an investigation into Valderrama's conduct, no criminal charges or disciplinary action has been brought against Poitevent for the killing. *See id.*

In 2011, Border Patrol agents were attempting to arrest an individual who had crawled through a sewer pipe into the United States when an agent shot and killed José Alfredo Yañez Reyes, who was on the Mexican side of the border. *See* Bob Ortega, *Deadly Force Cases by Border Patrol Raising Questions*, Arizona Republic, Sept. 13, 2014, *available at* http://tinyurl.com/OrtegaDeadly. The agents claimed that Yañez had retreated into Mexico from the pipe, climbed a tree, and thrown a rock and a nail-studded board at one of them, justifying the use of lethal force. *See* Andrew Becker, *Scathing Report Deems Fatal Border Patrol Shooting 'Highly Predictable,'* Reveal

(Mar. 4, 2016), *available at* http://tinyurl.com/BeckerReveal; *see also* Binelli, *supra*. But a witness stated that Yañez was not throwing objects at the agent, but rather had threatened to take a video of the incident with his cellphone. *See id.* Tom Frazier, a former Baltimore police commissioner and former Department of Justice official who reviewed the incident in connection with a pending civil lawsuit, noted that even if Yañez had thrown objects, the agent "could and should have employed de-escalation techniques and considered the proper imminent peril standard." *Id.* Again, the agents were never disciplined and no criminal charges were brought. *See* Binelli, *supra*.

In 2012, Guillermo Arévalo Pedraza was picnicking with his family on the Mexican side of the Rio Grande River when a Border Patrol agent, who was passing in a patrol boat, shot and killed him. *See* Graff, *supra*. The agents on the boat stated that they were responding to rock throwing from the shore. *See* Ortega, *Deadly Force Cases*, *supra*. Witnesses, however, disagreed: "Pedraza was not throwing rocks, but [was] one of several people shouting at the agents not to drown a man swimming in the river." *Id.* Video footage of the incident shows the Border Patrol boat speeding away from the scene immediately after the shooting, strongly suggesting that—even if the agents had been subjected to rock throwing—they could have sped out of throwing distance instead of shooting Pedraza. *See* Graff, *supra* (linking to a YouTube video of the incident at http://tinyurl.com/YTPedraza). Again, the incident resulted in no discipline and no criminal charges. *See* Binelli, *supra*.

Also in 2012, Border Patrol agent Lonnie Ray Swartz fatally shot 16-year-old José Antonio Elena Rodríguez 10 times in the back while he was walking along a main thoroughfare on the Mexican side of the border. *See* Binelli, *supra*. Swartz "claimed he was acting in self-defense when confronted by rock throwers on the other side of the border." Richard Gonzales, *Federal Appeals Court Considers Border Shooting Case*, NPR (Oct. 21, 2016), *available at* http://tinyurl.com/GonzalesNPR. Initial reports also stated that at least one rock had hit and injured a police dog. *Cf.* Binelli, *supra*.

But further inquiry contradicted these accounts. Although CBP has not publicly released surveillance videos of the shooting, James Tomsheck has viewed the footage, which "demonstrated that José Antonio was certainly not throwing rocks at the time he was shot." *Id.*; *see also* Becker, *Scathing Report, supra*. Instead, the footage shows two people—neither of whom are José Antonio—attempting to scale a fence and two police officers and a Border Patrol agent observing them, when Swartz arrives on the scene, "walks to the fence, pulls out his gun and begins firing." Binelli, *supra*. José Antonio "collapsed on a sidewalk" nearby. *Id.*

No disciplinary action was brought against Swartz. However, Rodríguez's family instituted civil litigation. The district court found that Swartz was not entitled to qualified immunity where the complaint alleged that Rodríguez "was not committing a crime[,]... throwing rocks," hiding, "using a weapon, or in any way threatening U.S. Border Patrol agents or anyone else," immediately before the shooting, and

where observers stated that Rodríguez "did not pose a threat, but was peacefully walking down the street." *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1036 (D. Ariz. 2015). Two months after the district court's decision, and almost three years after Rodríguez's death, the Department of Justice brought criminal charges against Swartz. *See* Binelli, *supra*. The case remains pending.

Finally, in the instant case, Respondent Mesa shot and killed Petitioners' 15-year-old son, Sergio. The FBI initially reported that agents were responding to a group of smugglers near a port of entry and that, after the agents had detained two of the individuals, others began to throw rocks. *See* Fed. Bureau of Investigation, *Assault on Federal Officer Investigated* (June 8, 2010), *available at* http://tinyurl.com/FBIAssault. According to the FBI, after Mesa "gave verbal commands to the remaining subjects to stop and retreat[,]... the subjects surrounded [Mesa] and continued to throw rocks at him," at which time Mesa fired, killing Sergio. *Id.*

However, video footage of the incident appears to tell a different story. "In one video, some youths can clearly be seen making throwing motions. But [Sergio] isn't among them. He's visible, peeping out from behind a pillar beneath a train trestle. He sticks his head out; Mesa fires; and the boy falls to the ground, dead." Ortega, *Deadly Border Agent Incidents Cloaked in Silence*, *supra*. Other videos "appear to show that [Sergio had been] trying to run and hide" before he was shot. Adam Liptak, *An Agent Shot a Boy Across the U.S. Border. Can His Parents Sue?*, N.Y. Times, Oct. 17, 2016, *available at*

http://tinyurl.com/LiptakAgent; *see also* Graff, *supra* (linking to a YouTube video of the incident at https://www.youtube.com/watch?v=7wI2Q1XikLw). Notably, the final Department of Justice report does not state that Respondent Mesa was "surrounded" by rock throwers or that Sergio was throwing rocks. *See* U.S. Dep't of Justice, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca* (Apr. 27, 2012) (hereinafter *DOJ Hernandez Press Release*), *available at* http://tinyurl.com/DOJHernandezPR. Nevertheless, no disciplinary action was brought, and DOJ closed the case without pressing charges, concluding that "the agent did not act inconsistently with CBP policy or training regarding use of force." *Id.*

In addition to the lack of accountability for these killings, reports of other forms of abuse likewise rarely result in discipline. Out of 809 complaints alleging abuse from January 2009 to January 2012, 97 percent of the cases that reached a formal decision resulted in "No Action Taken." Daniel E. Martínez, Guillermo Cantor, & Walter A. Ewing, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, American Immigration Council (May 2014), at 1, *available at* http://tinyurl.com/MartinezNoAction. Of the 67 cases reviewed in the PERF study that found that officers routinely used excessive force in response to rock-throwing, no charges were brought as a result of CBP's internal review, although two agents "received oral reprimands." Brian Bennett, *Border Patrol Absolves Itself in Dozens of Cases of Lethal Force*, L.A. Times, June 15, 2015, *available at* http://tinyurl.com/Bennett20150615. Three cases remain "within the

purview of the Department of Justice's Civil Rights Division." Bob Ortega, *CBP: No Action Against Border Agents in Deadly-Force Cases*, Arizona Republic, June 8, 2015, *available at* http://tinyurl.com/OrtegaNoAction; *see also* Bennett, *Border Patrol Absolves Itself*, *supra*.

IV. Board Patrol Agents Who Use Illegal Force Will Not Be Held Accountable Unless Suits Like Petitioners' Are Allowed To Proceed.

If victims and their families are unable to hold Border Patrol agents accountable for using excessive force, agents who employ such force can continue to abuse and kill individuals at the border with impunity. The United States raises the possibility of criminal proceedings in the United States or Mexico, *see* U.S. Opp. 8, but, as the government acknowledges, it refused to extradite Respondent Mesa for prosecution in this case. Pursuant to the applicable extradition treaty, the United States has no obligation to extradite its own citizens, and it is "inconceivable" that the United States would choose to extradite a government official who it concluded acted "in good-faith execution of his duties." Adriana M. Chavez, *Experts Say Extradition Unlikely If Agent Charged*, El Paso Times, June 22, 2010, 2010 WLNR 12633548 (quoting Allen Weiner, Director, Stanford Program in International and Comparative Law); *see DOJ Hernandez Press Release*, *supra*. Indeed, the United States does not point to a single instance, and *amici* have found none, in which it extradited a CBP agent to Mexico for prosecution. The theoretical possibility of extradition to Mexico thus provides no meaningful deterrent to excessive use of force.

Similarly, the threat of prosecution in the United States appears minimal. The failings of the internal investigation process reveal that the system is skewed to avoid discipline and prosecution. Even in the only cross-border-shooting case that resulted in prosecution, the case of 16-year-old José Antonio Elena Rodríguez, the Department of Justice took three years to obtain an indictment and did so only after significant media coverage and a civil suit. *See* Rob O'Dell, *Experts: Pressure from Advocates, Press Led to Murder Charges Against Border Patrol Agent in Teen's Death*, Arizona Republic, Sept. 28, 2015, *available at* http://tinyurl.com/ODellExperts.

Against this backdrop, the prospect of civil liability plays a proper and important role in deterring Border Patrol officers from using excessive force in confrontations with individuals at and across the border. In many instances, civil suits also expose improper use of force where internal investigations failed. For example, the civil suit in Juan Mendez's case exposed the inconsistences in Agent Poitevent's statements that led to the discovery of possible CBP coaching. *See* Becker, *2010 Border Patrol Fatal Shooting*, *supra*. In José Alfredo Yañez Reyes's civil case, a law enforcement expert highlighted the agent's improper use of force. *See* Binelli, *supra*. And it may have been the district court's refusal to dismiss the civil suit in the Rodríguez case on qualified immunity grounds that finally convinced the Department of Justice to bring criminal charges two months later, almost three years after the underlying incident. *Id.*

"[P]ermitting noncitizens to bring claims of excessive deadly force... reduces the threat, to citizens and

foreigners alike, that executive agents will 'switch the Constitution on or off at will' by exporting violence...." Eva L. Bitran, *Boumediene at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 Harv. C.R.-C.L. L. Rev. 229, 249-50 (2014) (quoting *Boumediene v. Bush*, 553 U.S. 723, 765 (2008)). Claims like Petitioners' should be allowed to proceed.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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Supreme Court of the United States

JESUS C. HERNANDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR FORMER POLICE CHIEFS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

This brief is submitted by the following:

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- David Mitchell – Secretary, Delaware Department of Safety & Homeland Security (2004–2009); Superintendent, Maryland State Police (1995–2003); Chief of Police, Prince George's County, Maryland (1990–1995).

- Roberto Villasenor – Chief of Police, Tucson, Arizona (1980–2014).

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[1] All parties to this litigation have consented to this *amici curiae* brief, and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

We are former chiefs of police, from various jurisdictions across the country. Collectively, we have overseen the training of tens of thousands of police officers, and have first-hand knowledge of how officers actually make (and are trained to make) decisions in the field, often in dangerous and fast-moving situations. We therefore have a strong interest in ensuring that police officers and other law enforcement officials are protected by qualified immunity when they act reasonably—based on the information available to them at the time—and in accordance with clearly established law. We also have a strong interest in helping ensure that this Court's qualified immunity decisions are consistent with the use of best practices in officer training and conduct.

In light of our professional experience and expertise, this brief focuses on the qualified immunity issues presented by this case. In particular, we are troubled by the approach to those issues adopted by the court below—which looked at qualified immunity through the lens of hindsight, rather than standing in the shoes of a reasonable officer at the time of the incident. As we explain, the qualified immunity analysis should accord with the real-world decisionmaking process of law enforcement and create the right incentives for law enforcement officials to follow their training.

SUMMARY OF ARGUMENT

Qualified immunity strikes a balance between protecting law enforcement officers from personal liability for their objectively reasonable mistakes,

while providing the officers a sufficient incentive to follow their training and clearly established law. But this balance works effectively only if the qualified immunity analysis turns on the situation the officer reasonably perceived at the time. Maintaining that contemporaneous focus—rather than focusing on the situation as it appears with the benefit of hindsight—reflects the real-world decisionmaking process of law enforcement, comports with widely accepted standards of officer training, and encourages officers to use force only when doing so is reasonable and necessary.

In particular, this contemporaneous inquiry is sensitive to the challenges officers face in fast-moving and potentially dangerous situations, where they must make on-the-spot judgments about whether the use of force (including deadly force) is appropriate. By contrast, under the approach embraced by the court below, the qualified immunity analysis hinges on after-the-fact assessments such as the suspect's citizenship and the degree of his ties to the United States. That approach, however, is unmoored from the practical realities of law enforcement decisionmaking and creates precisely the wrong incentives.

First, the Fifth Circuit's hindsight-driven analysis severs the traditional link between qualified immunity and the officer's exercise of judgment in fast-moving situations. Instead, it permits courts to examine factors that no reasonable officer would ever consider when deciding whether to use deadly force. Indeed, under widely accepted standards of officer training—both in the United States and

abroad—officers should not consider such factors when deciding whether to use deadly force. A rule of law that invites consideration of these factors will only create perverse incentives, encouraging officers to engage in the perilous exercise of speculating about a subject's citizenship and connections to the United States—perhaps hoping that, if their speculation about those legal questions turns out to be correct, the officer will be insulated from liability for violations of the law.

Second, hinging the qualified immunity analysis on after-the-fact discoveries could end up unfairly subjecting law enforcement officials to personal liability when they acted entirely reasonably based on the information available to them at the time. Law enforcement officials are often forced to act based on incomplete or inaccurate information. The Fifth Circuit's contrary rule—which invites consideration of facts that the officer may not have known at the time, or reasonably may have misapprehended—will do nothing to improve good officer behavior. This Court should reverse that holding, and adhere to the traditional rule that focuses on the officer's on-the-spot decisionmaking based on the circumstances the officer reasonably perceived at the time.

ARGUMENT

CONSISTENT WITH WIDELY ACCEPTED STANDARDS OF OFFICER TRAINING, THE QUALIFIED IMMUNITY ANALYSIS SHOULD TURN ON THE CIRCUMSTANCES REASONABLY PERCEIVED BY THE OFFICER AT THE TIME OF THE INCIDENT.

A. Qualified Immunity Plays An Important Role In Fast-Moving Situations Calling For On-The-Spot Assessments By Law Enforcement.

Qualified immunity protects government officials from being held liable for their objectively reasonable mistakes—a protection that is particularly important in the fast-moving situations that law enforcement officers face every day. As this Court has recognized, these officials "must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office," and it would be unfair to penalize them for their reasonable (albeit mistaken) judgments under these challenging circumstances. *Scheuer v. Rhodes*, 416 U.S. 232, 246–48 (1974).

Because qualified immunity protects officials' well-founded and good-faith judgments, the inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established *at the time it was taken*." *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (emphasis added). As Justice Holmes explained, in "cases where the expert on the spot may be called upon to

justify his conduct later in court, . . . great weight is given to his determination, and the matter is to be judged on the facts *as they appeared then, and not merely in the light of the event.*" *Moyer v. Peabody*, 212 U.S. 78, 85 (1909) (emphasis added and citations omitted); *see also Scheuer*, 416 U.S. at 247–48 (focusing on "all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based") (quoting *Moyer*, 212 U.S. at 85).

In short, qualified immunity is a flexible doctrine that shields officers from liability for reasonable error, while allowing them to be held accountable for clearly unlawful decisions they make based on the information available to them at the time. It does not require omniscience or encourage after-the-fact nuanced analyses of considerations that could not reasonably be known and evaluated in the critical moment when the officers must act. The proper perspective is that of the officer in the field—not that of the armchair lawyer or historian.

B. Law Enforcement Officers Are Trained To Focus On The Observed Situation, Not The Jurisdiction Of The Incident Or A Subject's Status.

1. Whether deadly force is appropriate turns on the officer's contemporaneous and reasonable perception of imminent peril.

The need for a qualified immunity doctrine that protects reasonable judgment calls by law enforcement is particularly acute where officers

confront rapidly evolving and potentially dangerous situations—some of which occur at the U.S. borders and call for on-the-spot decisions about whether to use force, including deadly force. Both within the United States and throughout the world, there is a striking degree of consensus regarding the appropriate standards for the use of force. And, particularly significant here, these standards typically do *not* invite the officer to engage in such nuanced and legalistic assessments as trying to determine the citizenship status of a subject or the degree of the subject's ties to a particular country or his precise location relative to a border.

For instance, the Customs and Border Protection's *Use of Force Policy, Guidelines, and Procedures Handbook* explains that determination of whether use of force is "objectively reasonable" requires primary consideration of officer safety, the severity of the crime, whether the subject is actively resisting arrest or capture, and whether there is a foreseeable risk of injury. U.S. Customs and Border Protection Office of Training and Development, *Use of Force Policy, Guidelines, and Procedures Handbook* 2 (May 2014).[2] Additional factors include readily observable facts: the apparent age, size, and strength of the officer and the subject; whether weapons are involved; how many people are around; and the environmental conditions. Deadly force is permitted only when, considering all the circumstances, an officer has a reasonable belief that

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[2] *Available at* https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf.

the "subject of such force poses an imminent danger of serious physical injury or death to the officer/agent or to another person." *Id.* at 3.

Similarly, a recent review of Customs and Border Protection policies confirms that agents "should be prohibited from using deadly force against subjects throwing objects not capable of causing serious physical injury or death to them." The Police Executive Research Forum, *U.S. Customs and Border Protection Use of Force Review: Cases and Policies* 2 (Feb. 2013).[3] The report emphasizes that training should focus on "specific situations and scenarios," including such situation-specific tactics as "the use of cover and concealment" and "maintaining safe distances." *Id.* It does *not* ask that agents determine whether a subject is a U.S. citizen, has connections to the United States, or is on one or the other side of the international border.

Nor does it make sense to train law enforcement to take these factors into account, as these officials are required to follow constitutional standards laid out by this Court and statutory standards across the country. In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court invalidated a state statute that authorized law enforcement to use deadly force whenever a felony suspect might escape. The Court held that deadly force is constitutionally reasonable only "[w]here the officer has probable cause to believe that the suspect poses a threat of serious

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[3] *Available at* https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf.

physical harm, either to the officer or to others." *Id.* at 11. The Court rejected the idea that a suspect's mere status—there, a person committing a felony—could justify qualified immunity where it otherwise would be unwarranted. Instead, the constitutional standard requires law enforcement officials to assess conditions on the ground and use force only when justified in the moment. *Id.*; *see also Scott v. Harris*, 550 U.S. 372, 383 (2007) (in determining whether an officer's use of deadly force was justified, a court "must consider the risk of bodily harm that [the officer's] actions posed to [the suspect] in light of the threat to the public that [the officer] was trying to eliminate"). The policies in states and localities are often framed similarly.[4] They do not mention citizenship status or the jurisdiction of the incident.

This constitutional standard is echoed throughout the world. *E.g.*, Commonwealth

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[4] *E.g.*, Model Penal Code § 3.07(2)(b)(iv) (Am. Law Inst. 1962) (use of deadly force not justified, unless the officer attempts an arrest for a crime involving the "use or threatened use of deadly force" or "there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed"); *Price v. Sery*, 513 F.3d 962, 964–65 (9th Cir. 2008) (upholding the constitutionality of municipal policy providing that "[m]embers may use deadly force to protect themselves or others from what they reasonably believe to be an immediate threat of death or serious physical injury.") (quoting Portland Police Bureau General Order § 1010.10); New York Police Dep't Patrol Guide § 221-01 (detailing new "Force Guidelines" that include eleven factors to consider, none of which includes subject's citizenship status or jurisdiction of encounter) (eff. June 1, 2016); Los Angeles Police Dep't Policy Manual § 556.10 (similar).

Secretariat, *Commonwealth Manual on Human Rights Training for Police* 65 (2006) ("Unnecessary and unlawful use of deadly force by a police officer would therefore constitute a violation of the right to life"); Organization for Security and Cooperation in Europe, *Guidebook on Democratic Policing* 23 (2d ed. 2008) ("[I]ntentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."); International Committee for the Red Cross, *Human Rights and Humanitarian Law in Professional Policing Concepts* 22–25 (2002) (stating that "[t]he intentional lethal use of firearms is allowed only when strictly unavoidable to protect life," and noting that non-citizens, among others, are entitled to protection under the law). Thus, no officer would consider either the jurisdiction of incident or the citizenship status of a subject in a totality-of-the-circumstances assessment of whether deadly force is justified.

2. Because jurisdiction and nationality are not relevant to the reasonableness of deadly force, including them in a retrospective qualified immunity analysis would create perverse incentives.

As described above, whether or not a law enforcement official is entitled to qualified immunity depends on the objective facts about the incident that the official confronts *at the time*—not on the happenstance of hindsight. *See supra*, § A. Incorporating these nuanced legal questions into the qualified immunity analysis does nothing to enhance the functioning of a well-trained police force, because those questions do not help an officer determine—

under the widely accepted standards discussed above—whether use of deadly force is appropriate.

As the law stands today, no reasonable police chief would train, or to our knowledge ever has trained, a police officer to use a lesser standard for deploying lethal force based on the legal jurisdiction in which the suspect is located. Nor would any reasonable police chief train, or to our knowledge ever has trained, a police officer to use a lesser standard for deploying lethal force based on the suspect's citizenship or nationality. Indeed, the facts of this case perfectly illustrate that point: In our experience as former chiefs of large and diverse police forces, it would be wholly unrealistic to expect an officer in a rapidly moving and potentially dangerous situation to try to determine the citizenship of the suspect—much less determine, as here, whether the suspect had a "significant voluntary connection" to the United States. *Hernandez v. United States*, 785 F.3d 117, 120 (5th Cir. 2015) (*en banc*).

Far from furthering broadly accepted standards of law enforcement training, the qualified immunity analysis embraced by the court below creates perverse incentives. It encourages officers to engage in the perilous exercise of guessing the citizenship and ties of the subject confronted—based on the premise that the officer need not worry about being exposed to liability if the subject turns out to be a non-citizen or on one side of a border. This is a concern everywhere, but it is of particular concern in cases such as this. As the Customs and Border Patrol has recognized, "some cases suggest that

frustration is a factor motivating agents to shoot at rock throwers." *Use of Force Review, supra*, at 9.

In these situations, where the officer's speculation turns out to be right, qualified immunity would only serve as a shield to insulate an officer who did not follow proper training or the law. That approach runs counter to both the overarching goals of qualified immunity—to protect reasonable, good-faith judgments by law enforcement, while also incentivizing adherence to clearly established constitutional rules—and widely accepted standards of officer training. This Court should reject it.

C. Permitting Retrospective Qualified Immunity Will Jeopardize Officers Who Act Reasonably.

The Fifth Circuit's qualified immunity holding is flawed not only because it rewards lucky bets about factors officers should not be trying to determine in fast-moving situations, but also because it may expose officers to liability in many situations where doing so would be unfair and would have no salutary effect on officer conduct in the future. Plaintiffs in Section 1983 cases have often attempted to use facts discovered *after* the incident at issue to impose liability on the officers who made good-faith judgments based on the facts known to them *at the time*. So far, this Court has shut the door to claims based on reasonable mistake, but a ruling here could open the door.

In *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012), for instance, the Court held that officers' execution of a search pursuant to the warrant of a

"neutral magistrate" is "the clearest indication that the officers acted in an objectively reasonable manner" and were entitled to qualified immunity—even where the plaintiff argued that the search was unconstitutional because it later transpired that the warrant was not supported by probable cause. *Id.* at 1245. As the Court pointed out, a long line of cases holds that the good-faith exception to the exclusionary rule "'defines the qualified immunity accorded an officer' who obtained or relied on an allegedly invalid warrant." *Id.* at 1245 n.1 (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986)); *see also Malley*, 475 U.S. at 345 (in cases alleging that officers requested an invalid warrant, the relevant question for qualified immunity purposes is "whether a reasonably well-trained officer *in petitioner's position* would have known that his affidavit failed to establish probable cause" and that "he should not have applied for the warrant") (emphasis added).

Thus, this Court's prior encounters with attempts to hold officers liable based on after-the-fact reassessments have reaffirmed that the qualified immunity inquiry focuses on "the facts as they appeared then, and not merely in the light of the event." *Moyer*, 212 U.S. at 85. That is, plaintiffs may not use retrospective re-assessments of warrants to impose liability on police officers who, under the circumstances as they appeared at the time, acted in a way that they reasonably believed to be legally permissible. *See Butz v. Economou*, 438 U.S. 478, 507 (1978) (qualified immunity protects government officials from liability for "mere

mistakes of judgment, whether the mistake is one of fact or one of law").

Adopting the Fifth Circuit's rule would be in considerable tension with that framework and would likely only serve as a potential pitfall for law enforcement. To take one example, officers frequently conduct permissible warrantless searches of what they believe are premises of absconded parolees. *Moore v. Vega*, 371 F.3d 110, 116 (2d Cir. 2004). But sometimes officers are mistaken about the identity of the occupants in the house they are searching. In *Moore*, the officers who conducted the search were "provided with incorrect information" and ended up searching the home of someone who was not on parole (as it turned out, the plaintiff's brother had the same name as the parolee the officers were looking for). *Id.* at 113–16. Nonetheless, the officers were granted qualified immunity from a claim alleging a violation of the Fourth Amendment, because "a mistake while engaging in the performance of an official duty . . . does not deprive a governmental officer of immunity." *Id.* at 117.

The Fifth Circuit's rule here, which permits courts to consider facts about a suspect's status that can be known only after-the-fact, would erode the foundations of that common-sense conclusion. If it were adopted, officers would no longer be able to assert qualified immunity based on the facts as they appeared at the time of their action, because the inquiry would permit the court to consider all the facts that theoretically *could have* been known—

even if no reasonable officer would have actually known the facts at the time.

Granting officers qualified immunity based on facts that they could not perceive at the time or were mistaken about is an integral part of the qualified immunity analysis. *See Hill v. California*, 401 U.S. 797, 802 (1971) ("[W]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.") (internal quotation marks omitted). The Court should not erode that important foundation here.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fifth Circuit.

Respectfully submitted.

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Supreme Court of the United States

JESUS C. HERNANDEZ, *et al.*,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE GOVERNMENT OF THE UNITED MEXICAN STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Government of the United Mexican States respectfully submits this brief as *amicus curiae* in support of Petitioner. Counsel for all parties have consented in writing to its filing.[1]

The 2,000-mile-long border between Mexico and the United States is the busiest in the world, with hundreds of millions of crossings each year.[2] Each of the two nations has a legitimate concern for the policies of the other in connection with their shared border. Mexico has a vital interest in working with the United States to improve the safety and security of the border and ensure that both governments' agents act to protect, rather than endanger, the safety of members of the public in the border area.

The border runs through populated areas, in some cases dividing in two a single town, city or Indian tribal area. In recent decades, the establishment of a secured and patrolled border has meant that residents of border communities come into fre-

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

[2] *See, e.g.*, U.S. Bureau of Transportation Statistics, *Border Crossing/Entry Data*, https://transborder.bts.gov/programs/international/transborder/TBDR_BC/TBDR_BCQ.html (July 2016); White House Press Release, *Remarks by President Obama and President Calderón of Mexico at Joint Press Conference* (March 3, 2011).

quent contact with officers guarding the border. In some areas, residents going about their daily business on the Mexican side of the border spend much of their day within shooting distance of armed U.S. Border Patrol agents.

Shootings at the border are, unfortunately, far from a rare occurrence. According to U.S. Customs and Border Protection's own statistics, its officers (including Border Patrol agents) have reported use of deadly force involving firearms 243 times from October 2010 through August 2016, nearly all of them at or near the U.S.-Mexico border.[3] Many of the shootings resulted in death, and a number of those killings involved shots fired across the border.

In this case, on June 7, 2010, U.S. Border Patrol agent Jesus Mesa shot and killed Sergio Adrián Hernández Güereca, a fifteen-year-old national of Mexico. At the time of the shooting, the agent was in the United States, and the boy was in Mexico. Sergio's parents sued Agent Mesa in U.S. District Court for damages for the unjustified killing of their son.[4] The District Court and the Court of Appeals en banc held that their claim could not be heard because their son was on Mexican soil when he was killed.

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[3] *See* U.S. Customs & Border Protection, *CBP Use of Force Statistics*, https://www.cbp.gov/newsroom/stats/cbp-use-force (Sept. 26, 2016), *archived at* https://perma.cc/PD3Y-5CAH.

[4] As this case is before the Court on review of an order granting a motion to dismiss for failure to state a claim, we assume the facts alleged in the complaint to be true for present purposes.

This case raises important issues concerning the applicability of the Fourth and Fifth Amendments to the U.S. Constitution. In recognition of U.S. sovereignty, Mexico respects the authority of the United States courts to interpret their own Constitution and laws. Mexico, however, hopes and believes that this Court will find it helpful to hear Mexico's perspective on matters affecting Mexico's sovereign interests.

As a sovereign and independent state, Mexico has a responsibility to maintain control over its territory and to look after the well-being of its nationals. When agents of the United States government violate fundamental rights of Mexican nationals and others within Mexico's jurisdiction, it is a priority to Mexico to see that the United States has provided adequate means to hold the agents accountable and to compensate the victims. The United States would expect no less if the situation were reversed and a Mexican government agent, standing in Mexico and shooting across the border, had killed a U.S. national standing on U.S. soil. Yet the Fifth Circuit's decision in this case effectively means the families of those killed by U.S. Border Patrol agents may not obtain any remedy, no matter how unjustified the agents' actions, if the victims happened to be on the Mexican side of the border when the agent opened fire.

SUMMARY OF ARGUMENT

Under this Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), there is no bright line at the border beyond which all constitutional rights cease. Rather, this Court has employed a case-by-case inquiry to determine if it would be impractical or anomalous to apply U.S. constitutional rights out-

side U.S. borders. Here, Agent Mesa was clearly on U.S. soil when he acted, and there are no practical or political difficulties in applying U.S. law regardless of which side of the border Sergio Hernández was on. Unlike *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), applying U.S. law in this case would not interfere with operations of the Mexican government within Mexico. On the contrary, providing an adequate and effective remedy would show appropriate respect for Mexico's sovereignty on its own territory and for the rights of its nationals.

The decision below also failed to take due account of the binding international human rights obligations that the United States has voluntarily undertaken to Mexico and its nationals. Those include, among other things, the fundamental right not to be arbitrarily deprived of life and the right to an adequate remedy when that right has been violated. A nation's obligations to respect human rights do not stop at its borders but apply anywhere that the nation exercises effective control. The Fifth Circuit's refusal to provide any remedy at all for an unjustified cross-border shooting of an unarmed Mexican national is plainly inconsistent with those obligations.

ARGUMENT

I.
THERE IS NO PRACTICAL REASON TO DENY A REMEDY MERELY BECAUSE THE FATAL SHOT STRUCK SERGIO HERNÁNDEZ ON THE MEXICAN SIDE OF THE BORDER

Mexico considers it important that the United States make available an effective remedy to individuals on Mexican territory seeking redress for unjustified violence by U.S. border officers. The lower courts' decisions in the case have effectively precluded any such redress.

This Court has recognized in the past that U.S. constitutional protections can extend beyond the nation's sovereign territory. Most recently, in *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court held that questions of application of U.S. constitutional rights to persons outside the United States must be answered on the basis of "objective factors and practical concerns, not formalism." *Id.* at 764; *see also id.* at 726-28, 757-63. The *Boumediene* case involved prisoners detained at the U.S. Naval Station at Guantánamo Bay, Cuba, an area under Cuban sovereignty but under the effective control of the United States. The Court accepted that Guantánamo was not part of the territory of the United States. But rather than apply a technical approach based on *de jure* sovereignty, the Court looked to the practical effects of U.S. control at Guantánamo and held that the constitutional right of habeas corpus applied there.

In so holding, this Court distinguished the case from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). In *Verdugo-Urquidez*, the Court declined to extend the Fourth Amendment's search warrant requirement to a search conducted in Mexico by Mexican police at the request of the U.S. Drug Enforcement Administration. The Court noted that applying U.S. constitutional requirements to actions of the Mexican police in cooperation with U.S authorities would raise serious practical difficulties for the ability of the United States to "'functio[n] effectively in the company of sovereign nations.'" *Id.* at 275 (quoting *Perez v. Brownell*, 356 U.S. 44, 57 (1958)). In his concurring opinion, Justice Kennedy emphasized that the inapplicability of the warrant requirement did not necessarily prevent the application of other U.S. constitutional rights, but he agreed with the majority that the circumstances of that case would make adherence to the Fourth Amendment's warrant requirement "impracticable and anomalous." *Id.* at 278 (Kennedy, J., concurring) (quoted in *Boumediene*, 553 U.S. at 759-60).

Here, by contrast, applying U.S. law would cause no clashes between U.S. and Mexican law. Agent Mesa, unlike the U.S. DEA agents in *Verdugo-Urquidez*, was not acting in cooperation with Mexican law enforcement agencies, nor was he carrying out any operations on Mexican territory. He was operating on U.S. soil as part of his duties under U.S. law, and he was in the United States when he fired the fatal shot. Extending the requirements of the U.S. Constitution to cover the actions of a U.S. officer in the U.S. would not interfere in any way with Mexico's "control over its territory ... and authority

to apply the law there." *Boumediene*, 553 U.S. at 754 (quotation and citation omitted).

According to the Complaint, just prior to the deadly shooting, Sergio Hernández and several other children were playing in the dry, concrete-lined channel of the Rio Grande, which separates El Paso from Ciudad Juárez. Pet. App. 146. The international border invisibly runs down the center line of that concrete channel.[5] The children were repeatedly running up the side of the channel, touching the U.S. border fence (which is on U.S. territory), and then running back down into the channel. Sergio Hernández was apparently on the Mexican side of the border when Agent Mesa shot him. But there would be no practical difficulties involved if the U.S. courts were to apply the same law of excessive force to Agent Mesa's actions, regardless of which side of that invisible line Sergio happened to be on when Agent Mesa's fatal shot struck him.

There is no reason why requiring Agent Mesa to answer for his actions in a U.S. court would require any different considerations than any other excessive-force case heard by the U.S. courts. Applying U.S. constitutional law in such a case does not disrespect Mexico's sovereignty. Any invasion of Mexico's sovereignty occurred when Agent Mesa shot his gun across the border at Sergio Hernández—not when the boy's parents sought to hold Agent Mesa responsible for his actions. Contrary to what the United

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[5] Convention for the Solution of the Problem of the Chamizal, U.S.-Mex., art. 3, Aug. 29, 1963, 15 U.S.T. 21, 505 U.N.T.S. 185.

States has asserted in its Brief in Opposition (at 20-21), a private civil suit arising from the shooting of a Mexican national at the border does not implicate "national security and international diplomacy" when the victim is struck by a bullet on the Mexican side of the border any more than when the lethal impact occurs on the U.S. side of the border. The prior *amicus* briefs submitted by Mexico, like this brief, evidence Mexico's concern that recourse to justice be available to its nationals regardless of where their son happened to be standing when the fatal shot was fired.

When an illegal act is committed in one country and has a direct effect in another country, it is well recognized that *both* countries have jurisdiction to prescribe the applicable law, to punish violations and to adjudicate disputes. *See, e.g.*, *Restatement (Third) of the Foreign Relations Law of the United States* § 403 cmt. d (1987); *id.* §§ 421(2)(i)-(j), 431(1). Exercise of jurisdiction by either, therefore, is neither impracticable nor an affront to the sovereign interests of the other. Mexico has a fundamental interest in protecting the rights of its nationals and other persons in its territory, but the United States also has an interest in preventing its own territory from being used to launch assaults on nationals of friendly foreign nations—particularly if those attacks are carried out by a federal officer of the United States in the course of his duties.[6]

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[6] For that reason, Judge Dennis was mistaken when he suggested, in his concurring opinion below, that it would raise "practical and political questions" to apply the U.S. law

(continued)

Indeed, in a similar case, the United States commenced a criminal prosecution against the Border Patrol agent involved,[7] illustrating that United States courts can exercise jurisdiction over cases arising from cross-border shootings. But criminal prosecution in the United States is entirely within the U.S. government's discretion, and it affords no meaningful remedy when, as in every Border Patrol shooting to date except one, the United States declines to prosecute the Border Patrol agent. The Mexican government has sought the extradition of Agent Mesa to Mexico, but the U.S. government denied that request and has not itself prosecuted Agent Mesa. As a practical matter, if Agent Mesa avoids travel to Mexico, any effective and enforceable remedy against him can only come from the U.S. courts, regardless of any civil or criminal jurisdiction the Mexican courts might have.

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of excessive force to Agent Mesa's actions in this case. *Hernandez v. United States*, 785 F.3d 117, 133 (5th Cir. 2015) (en banc) (Dennis, J., concurring in part and concurring in the judgment) (Pet. App. 32).

[7] *United States* v. *Swartz*, No. 4:15-cr-1723 (D. Ariz., filed Sept. 23, 2015). In that case, the victim's mother also filed a civil suit, and the U.S. District Court denied the agent's motion to dismiss. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015), *appeal filed*, No. 15-16410 (9th Cir. July 14, 2015).

II.
THE UNITED STATES HAS UNDERTAKEN AN OBLIGATION TO PROVIDE A REMEDY FOR HUMAN RIGHTS VIOLATIONS TO INDIVIDUALS ON BOTH SIDES OF THE BORDER

Mexico and the United States have recognized that respect for basic human rights, including the right not to be arbitrarily deprived of life, is part of the international obligations of every nation. Among other things, both Mexico and the United States have ratified the International Covenant on Civil and Political Rights (ICCPR),[8] which provides in Article 6(1) that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The ICCPR further provides, in Article 2(3), that individuals whose rights are violated "shall have an effective remedy," including judicial remedies, and that those remedies must be enforced when granted.

Although the United States' obligations under the ICCPR have not been treated as directly enforceable in United States courts, *see Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court has recognized that decisions interpreting the ICCPR and other international human rights treaties may be persuasive to the extent they shed light on basic human rights principles that are common to those treaties and the U.S. Constitution. *See, e.g., Roper v. Simmons*, 543

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[8] International Covenant on Civil and Political Rights, Dec. 19, 1966, U.S. Senate Treaty Doc. 95-20, 1966 U.S.T. LEXIS 521, 999 U.N.T.S. 171 (ratified by Mexico Mar. 23, 1981; ratified by U.S. June 8, 1992).

U.S. 551, 575-76 (2005); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). The international commitments that the United States undertook in Article 6(1) of the ICCPR have obvious parallels in the Fourth Amendment and the Due Process Clause of the Fifth Amendment to the U.S. Constitution. In fact, the principal reason the United States declared the ICCPR non-self-executing in U.S. courts was that it regarded existing U.S. constitutional law as being more than sufficient to comply with the ICCPR.[9]

It is well established under the ICCPR and other international human rights treaties that a nation has human rights obligations whenever it exercises "effective control" over an individual, even if such control is exercised outside of its own territory. The claim in this case lies within the scope of the United States' international human rights commitments because the U.S. federal government, through the actions of Agent Mesa, exercised power and effective control over Sergio Hernández.

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[9] The Executive Branch advised the Senate that "the substantive provisions of [the ICCPR] are entirely consistent with the letter and spirit of the United States Constitution and laws," except in a few instances in which the U.S. took an explicit reservation against specific ICCPR provisions. Letter of Transmittal from the President to the Senate, Feb. 23, 1978, 1966 U.S.T. LEXIS 521, at *2. Interpreting the U.S. Constitution and laws as inapplicable in a situation covered by the ICCPR would leave an unexpected gap in the intended U.S. legal framework for compliance with the ICCPR.

In particular, Article 2(1) of the ICCPR requires each party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR]." This provision has been read disjunctively to apply to "all individuals within [the State's] territory" and "all individuals ... subject to [the State's] jurisdiction."[10] In keeping with the intent of the ICCPR to protect individual human rights, "jurisdiction" has been given a flexible reading, turning on the State's effective exercise of control rather than on legal technicalities. The United Nations Human Rights Committee—the body charged with interpreting the ICCPR—has observed that:

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[10] *Celiberti de Casariego v. Uruguay*, Comm'cn No. 56/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/56/1979, ¶¶ 10.1-10.3 (July 29, 1981) (Covenant applies to cases of kidnapping by State agents abroad); *Munaf v. Romania*, Comm'cn No. 1539/2006, U.N. H.R. Comm., U.N. Doc. CCPR/C/96/D/1539/2006, ¶ 14.2 (Aug. 21, 2009) (State may be liable for violations of the Covenant outside of its area of control, as long as State's activity was "a link in the causal chain that would make possible violations in another jurisdiction"); *Kindler v. Canada*, Comm'cn No. 470/1991, U.N. H.R. Comm., U.N. Doc. CCPR/C/48/D/470/1991, ¶ 14.6 (July 30, 1993) (State party may be liable under the Covenant for extraditing a person within its jurisdiction or under its control if there is a real risk that the extradited person's rights under the Covenant will be violated in the receiving jurisdiction); Dominic McGoldrick, *The International Covenant on Civil and Political Rights*, § 4.3, in *Extraterritorial Application of Human Rights Treaties* (Fons Coomans & Menno T. Kamminga eds. 2004).

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.

U.N. H.R. Comm., General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (May 26, 2004).

This principle has been applied in a variety of situations in which States have violated the rights of individuals without fully controlling the territory on which those violations occur. For example, the U.N. Human Rights Committee has opined that the alleged secret detention and torture of a trade-union activist in Argentina by Uruguayan security officials would violate the ICCPR. *Lopez Burgos v. Uruguay*, Comm'cn No. 52/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981). The Committee observed that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another

State, which violations it could not perpetrate on its own territory." *Id.* ¶ 12.3.[11]

Under other human rights instruments, a similar principle has been found to apply even in situations where the State has used lethal force without ever obtaining physical custody of the victim. It is the use of force itself that constitutes sufficient exercise of control for purposes of the jurisdiction under the relevant human rights instruments. For example, the Inter-American Commission on Human Rights has applied an effective-authority test in several cases, including *Alejandre v. Cuba*, Case No. 11,589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. (Sept. 29, 1999).[12] The *Alejandre* case arose out of the well-known 1996 "Brothers to the Rescue" incident, in which the Cuban Air Force shot down two unarmed civilian airplanes in international airspace between South Florida and Cuba.

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[11] Similarly, the International Court of Justice has repeatedly recognized that the ICCPR applies in occupied territory under a State's control, even though that territory is not technically part of the State's sovereign territory. *See, e.g., Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 216 (Dec. 19, 2005); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 2004 I.C.J. 136, ¶¶ 109-111 (July 9, 2004).

[12] *See also, e.g., Aisalla Molina Case (Ecuador v. Colombia)*, Inter-State Petition IP-02, Inter-Am. Comm'n H.R., Report No. 112/10, OEA/Ser.L/V/II.140 Doc. 10, ¶¶ 87-103 (Oct. 21, 2010) (American Convention on Human Rights applied in Ecuador where Colombian armed forces conducted a bombing raid and thereafter "exercised acts of authority over the survivors" in the bombed area).

The Commission found that the facts constituted "conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the 'Brothers to the Rescue' organization under their authority." *Id.* ¶ 25. The Commission went on to hold that the Cuban Air Force's unjustified use of lethal force violated fundamental principles of human rights, including the right to life as recognized in Article I of the American Declaration of the Rights and Duties of Man.[13] *Id.* ¶ 53.

The European Court of Human Rights has adopted a similar functional approach in cases arising under the European Human Rights Convention.[14] It

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[13] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (May 2, 1948).

[14] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222. *See, e.g.*, *Pisari v. Moldova & Russia*, Eur. Ct. H.R., App. No. 42139/12, ¶ 33 (April 21, 2015) (convention applied to Russia where Russian solider shot and killed a Moldovan citizen even though Russian soldier was not in Russian territory when he fired his weapon); *Öcalan v. Turkey*, 41 Eur. Ct. H.R. 45, ¶ 91 (May 12, 2005) (convention applied in view of "effective Turkish authority" over individual in custody of Turkish officials in Nairobi, Kenya); *Cyprus v. Turkey*, Eur. Ct. H.R., App. No. 25781/94, ¶¶ 69-80 (May 10, 2001) (convention applied where Turkey exercised "effective control" in the Turkish Republic of Northern Cyprus); *Al-Saadoon v. United Kingdom*, Eur. Ct. H.R., App. No. 61498/08, ¶¶ 86-89 (June 30, 2009) (convention applied in U.K. military prison in Iraq); *Al-Skeini v. United Kingdom*, Eur. Ct. H.R., App. No. 55721/07, ¶¶ 130-150 (July 7, 2011) (convention applied in Iraq where the Coalition Provisional Authority exercised control).

has applied the Convention in several cases where, as here, a State's actions within its territory resulted in injuries to victims outside its territory. For example, in *Andreou v. Turkey*, Eur. Ct. H.R., App. No. 45653/99 (Oct. 27, 2009), a case involving the shooting of a civilian across the Turkish-Cypriot cease-fire line, the European Court of Human Rights held that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within the jurisdiction' of Turkey" so as to engage Turkey's human rights obligations. *Id.* ¶ 25.[15]

This case is, in many respects, an even easier case than the cases cited. Unlike *Alejandre*, *Andreou* and the cases involving occupied territory, the killing at issue in this case does not involve military action. Unlike *Lopez Burgos*, it does not involve overseas activities by intelligence or national security agencies. And unlike each of those cases, it does not even involve action outside a country's sovereign territo-

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[15] *See also, e.g., Pad v. Turkey*, Eur. Ct. H.R., App. No. 60167/00, ¶¶ 52-55 (June 28, 2007) (convention applied where Turkish helicopter shot and killed seven Iranian men near the Turkey-Iran border, even if it was unclear whether the Iranian men had crossed the border into Turkey); *Pisari*, *supra* note 14, ¶ 33 (noting the accepted rule that "in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities" into its jurisdiction, such that the convention and its obligations apply).

ry—Agent Mesa was standing on U.S. soil when he shot and killed Sergio Hernández. The agent was patrolling the United States side of the border in the course of his law-enforcement duties for the U.S. government and exercised effective control and authority over the boy through use of deadly force against him. The fact that the boy happened to be on the other side of the invisible line separating the two countries does not change the nature of the agent's actions in the United States or their lethal consequences.

This Court has already reached a similar result in *Boumediene*, in which it rejected a rigid territorial approach to the application of rights guaranteed by the U.S. Constitution to individuals outside the United States. Here, as in *Boumediene*, practicality and common sense—as well as the United States' international human rights obligations—demonstrate that the U.S. Border Patrol's obligation to refrain from unjustified use of deadly force does not vanish when the victim is located just across the border in the territory of a foreign nation.

CONCLUSION

For the reasons stated above, *amicus curiae* the Government of the United Mexican States respectfully urges the Court to reverse the judgment of the United States Court of Appeals for the Fifth Circuit and remand the case for proceedings on the merits.

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RECORD AND BRIEFS

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JESUS C. HERNANDEZ, *et al.*,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR *AMICI CURIAE* LEGAL HISTORIANS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*[1]

Each of the *amici curiae* is a professor who has taught classes and published books or articles concerning constitutional history of the United States. Certain of *amici*'s relevant publications are cited in this brief. *Amici* are:

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[1] Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a momentary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. All parties have given blanket consent to the filing of *amicus* briefs in this case.

SUMMARY OF ARGUMENT

This case is about cross-border responsibilities of U.S. government agents. Accordingly your *amici* seek to explain the history and meaning of the Due Process Clauses as they apply to any "person."

The meaning of any person affects whether there is legal responsibility for the intentional cross-border killing of a fifteen-year old boy by a government agent who had "no reason to suspect. . . had committed any crime or engaged in any conduct that justify the use of force, let alone deadly, force," and for whose death there was "no apparent justification," *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc), adopting the statement of facts by the panel in *Hernandez v. United States*, 757 F.3d 249, 255-57 (5th Cir. 2014) although reversing the panel on the law.

The framers of the 5th Amendment Due Process Clause deliberately chose not limit it to citizens or even inhabitants, but rather used the broader language that "no person" could be deprived of life, liberty or property without due process of law.

The framers of the 14th Amendment Due Process Clause deliberately chose not limit it to citizens or even inhabitants, but rather used the broader language that "no person" could be deprived of life, liberty or property without due process of law, openly acknowledging that they had taken the language of the clause from the 5th Amendment.

Taken together, this history shows that the 5th Amendment was designed to protect the rights of both citizens and non-citizens by prohibiting the government

from acting arbitrarily or by violating the fundamental rights of any person.

ARGUMENT

I. The Fifth Amendment Due Process Clause Applies to ALL Persons

British Origins of Due Process

Professor Tribe referred to "due process" as "the famous phrase found in both the Fifth and Fourteenth Amendments." Laurence H. Tribe, *American Constitutional Law* 33-34 (3d edition, Foundation Press, N.Y., N.Y., 2000). The due process clause is commonly traced to Magna Charta, Clause 39 ("law of the land").[2] Professor Amar noted that "Prior to the adoption of the fourteenth amendment, the only major treatment of the fifth amendment due process clause was in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 276 (1855)"[3] (indicating

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[2] John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 156, Section 245 (4th ed. 1879; reprint 1997)(the fifth amendment "borrowed from Magna Charta"). The same source indicates that the "same provision is contained in the state constitutions." The term "law of the land" and the term "due process of law" stood for the same idea. *Id.* In some states the term "due course of law" is used to express the same concept as due process of law. See Ohio Constitution, Art. I, Section 16 (an injured person "shall have remedy in due course of law...") The "due course of law" provision is the equivalent of the "due process of law" provision in the Fourteenth Amendment to the United States Constitution. *Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 422-23, 633 N.E. 2d 504, 511 (1994), citing *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544, 38 N.E.2d 70, 72. (1941)

[3] Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment," 101 Yale L. J. 1193, 1225-1226 (1992). *Amici* do not

that "due process of law" was intended to convey the same meaning as the "law of the land" in the Magna Charta). Kermit Hall, William Wiecek, and Paul Finkelman, *American Legal History* 5 (1991) in their editors' comment state that the Magna Charta "is the source of modern procedural and substantive due process" and that "law of the land" and "due process" "were equivalents."

William Lawrence (R-Ohio), who had been a lawyer, an Ohio state judge (1857-1864), editor of the *Western Law Magazine* (1859-62), six term Congressman, who would later become the First Comptroller of the U.S. Treasury (1880-85), indicated that "due process of law" and "law of the land" were "equivalent expressions," citing several cases as well as treatises by Theodore Sedgwick, Chancellor James Kent, Justice Joseph Story, and others. *Cong. Globe*, 41st Cong., 3d Sess. 1245 (1871).

One of the key analysts of the 5th Amendment Due Process Clause and proponent of the 14th Amendment Due Process Clause was John A. Bingham. (R-OH) who authored this section of the 14th Amendment, steered it through the Joint Committee on Reconstruction, was the floor manager in the House, and who gave more

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count the Court's controversial and incorrectly decided *Dred Scott v. Sanford*, 60 U.S. 397 (1857) (lead opinion of Chief Justice Taney found that federal statutes prohibiting slavery in the territories deprived the slaveholder of property without due process.) One of the nation's leading constitutional scholars, Akhil Amar, has summarized this part of Taney's opinion in just three words: "This was nonsense." This appears, along with a fuller explanation of the reasons for his conclusion in Akhil Reed Amar, *America's Constitution, A Biography* 265-66 (Random House, N.Y., N.Y, 2005).

speeches in support of the provisions than any other member of Congress. Michael Les Benedict, *A Compromise of Principle* 31-32 (W.W. Norton Co., N.Y. 1974), noted that Bingham was the 8th most senior Republican in the 40th Congress, a member of the House Committee on Reconstruction in the 39th & 40th Congresses, and its Chairman in the 40th Cong. In a list of "Prestigious Republican Members of the House" in the 38th-40th Congresses, Bingham, was one of only 11 members listed. Historian Joseph James called Bingham the "leader in the framing and ratification fight. . ." Joseph James, *The Ratification of the Fourteenth Amendment* 32 (Mercer U. Press, 1984). Further, James referred to Bingham as "the principle author of the significant first section of the [14th] amendment." *Id.* at 45. Indeed, the editor of the *Journal of the Joint Committee of Fifteen on Reconstruction*, Benjamin J. Kendrick, wrote that from 1865 on Bingham was "regarded as among the five or six leading Republican members" of the House. In speaking of Bingham's efforts to enact the provision concerning due process, equal protection, and privileges and immunities, the editor wrote that "it is not too much to say that had it not been for his untiring efforts the provisions for nationalizing civil rights would not have found a place in the fourteenth amendment." Benjamin J. Kendrick, *The Journal of the Joint Committee on Reconstruction* 184 (1914).

During the debate over the Supplementary Enforcement Act, Bingham confirmed Lawrence's view when responding to George W. Woodward (D-PA.) who was a lawyer and had served as a Justice and Chief Justice of the Pennsylvania Supreme Court, though denied confirmation when President Polk nominated

him to the U.S. Supreme Court. With his normal candor, Bingham said Woodward's interpretation amounted to "nothing" because: "It has been decided by the Supreme Court of the United States long ago, and, so far as I know, [there] is not a question by any intelligent jurist in America that the words quoted by the gentleman from your Constitution 'due process of Law' simply mean the law of the land." *Cong. Globe*, 41st Cong., 3d Sess. 1284 (1871). See also the speech of Samuel Shellabarger (R-OH), also a lawyer who served several years in Congress and later as U.S. Minister to Portugal (1869), on the Ku Klux Klan Act, citing the New York Court of Appeals decision of *Darlington v. New York*, 31 N.Y. 164, 188-89 (1865) in which Shellabarger described the Court of Appeals as "declar[ing] that" the New York statute was "identical" to a portion of the Magna Charta." *Cong. Globe*, 42nd Cong., 1st Sess. 751 (1871).[4]

Text of the clause in the Magna Charta

As originally written in 1215 and issued by King John of England, clause 39 of the Magna Charta was restricted to free men as the term was then understood. It read:

> (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against

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[4] The language reported in the *Congressional Globe* appears to be a paraphrase. The Court opinion states that "the objection of the defendants arises out of a constitutional restraint, substantially identical with one of the provisions of Magna Charta (ch. 29)," *Darlington v. Mayor of N.Y.*, 31 N.Y. 164, 188-89 (1865).

> him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

British Library, English translation of Magna Carta, https://www.bl.uk/magna-carta/articles/magna-carta-english-translation

It was reissued in 1225 with some changes and subsequently codified in that form. The Latin text reads:

> (39). Nullus liber homo decetero capiatur vel imprisonetur aut disseisiatur de aliquo libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exuletur aut aliquo alio modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terre.

Online Library of Liberty. http://oll.libertyfund.org/pages/1215-magna-carta-latin-and-engish (accessed 12/1/2016)

The translation of the 1225 issue reads:

> No Free-man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in anyway destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the

> land.—To none will we sell, to none will we deny, to none will we delay right or justice.

Online Library of Liberty, http://oll.libertyfund.org/pages/1215-magna-carta-latin-and-engish (accessed 12/1/2016)

Thus as originally written the clause protecting liberty "by the laws of the land" referred only to freemen as that term was then understood. But by 1354 the language became more inclusive:

> No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law.

LII CRS Annotated Constitution (accessed 12/1/2016), https://www.law.cornell.edu/anncon/html/amdt5bfrag1_user.html#fnb4ref

Thus the British language embraced all men when New York proposed a due process clause in its New York Ratification Resolutions.

American origins of the due process clause

The proposal for a due process clause came from New York in its 1788 U.S. Constitution Ratification Resolution:

> [N]o Person ought to be taken imprisoned or disseised [sic] of his freehold, or be exiled or deprived of his Privileges, Franchises, Life, Liberty or Property but by due process of Law.[5]

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[5] 2 *Documentary history of the Constitution of the United States of America, 1786-1870,* 190-203. (1894). All of the volumes for this

In the context of the post-Revolutionary era, with its emphasis on natural law and the rights of man, New York's proposal was written in that universal language, extending therefore to all persons, to protect the inborn and inalienable rights of all mankind.[6] Columbia College President William A. Duer, writing in 1868 noted that when separating from Great Britain, the colonists claimed "indubitable rights and liberties to which the respective colonies were entitled."[7] Duer noted that most of these were "natural rights."[8] But Duer also noted that while these natural rights were "indeed, common to all mankind," they were secured to British subjects by the "Magna Charta, and other fundamental laws. . ."[9]

Madison reworded the New York proposal and included the revised language in his proposed amendments to the U.S. Constitution to meet the concerns of those states which had some reservations about the absence of a formal Bill of Rights. The House of Representatives, acting upon the submissions of James Madison, sent seventeen amendments to the

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title are available in the Hathi Trust Digital Library. The link to the main record for this title is: https://catalog.hathitrust.org/Record/001141005.

[6] U.S. Declaration of Independence, 1 Stat. 2. [Emphasis added].

[7] William Alexander Duer, *A Course of Lectures on the Constitutional Jurisprudence of the United States* (1868). In this instance Duer was referring to the claims made of the Congress of 1774. *Id.* at 50.

[8] *Id.* at 51.

[9] *Id.* at 51. Duer included Blackstone's classifications of the rights of personal security, personal liberty and the right of private property, *id.*

U.S. Senate, which approved twelve of those proposed amendments. They were then submitted to the states. At the time the states approved ten of the twelve proposed, commonly referred to as the Bill of Rights. L. Tribe, *American Constitutional Law* at 8-9, n. 8. See also Paul Finkelman, "James Madison and the Bill of Rights: A Reluctant Paternity," 1990 Sup. Ct. Rev. 301.

Madison and the first Congress had knowledge of a number of then contemporary words that could have limited the protection provided by the due process clause. These included:

- "inhabitants" [Articles of Confederation, Art. 4, section 1; Ordinance of 1784; Ordinance of 1787, including Art. IV; and U.S. Constitution, Art. I, Section 2];
- "free inhabitants" [Articles of Confederation, Art. 4, Section 1; Ordinance of 1787, Art. V; U.S. Constitution, Art. I, Section 3];
- "free male inhabitants" [Ordinance of 1787];
- "residents" [Ordinance of 1784 and Ordinance of 1787];
- Aliens identified as "subject of a foreign state" [U.S. Constitution, 11th Amendment];
- "Free citizens" [Articles of Confederation, Art. 4, Section 1];
- "citizens" [Ordinance of 1787];
- "citizens of each state" [U.S. Constitution, Art. IV, Section 2];

- citizens of the United States [U.S. Constitution, Art. II, Section 1; Art. IV, Section 2]; and
- natural born citizen or a citizen at the time of the adoption of the Constitution [U.S. Constitution, Art. II, Section 1].

None of these were chosen for use in the Fifth Amendment. Rather, Madison and all those who framed and ratified the amendment used the broader and more inclusive words: "No person . . . shall be deprived of life, liberty, or property without due process of law; . . ." Article V of the Amendments of the U.S. Constitution (emphasis added). Other examples of the use of the words "No person..." include U.S. Constitution, Art. I, Section 3; Art. I, Section 9; Art. I, Section 2; Art. I, Section 6; and The Articles of Confederation Art. 5, Section 2. Further, the Articles of Confederation spoke of "any person," Art. 4, Section 2; and Article 5, Section 2. As Madison told the House of Representatives on June 8, 1789, some of his proposals "state the perfect equality of mankind." http://press-pubs.uchicago.edu/founders/documents/bill_of_rights s11.html.

The universal language of the clause reflects the importance of the right to continue to live, one of mankind's most cherished rights. All the states in the Union recognize a right to act in self-defense to protect one's life for that reason. It is also why we value and honor so highly those individuals who place their lives in peril to serve in the U.S. military, police forces, fire departments, and protect the nation. Further, this is why we honor those who gave up their lives that the nation might live.

These values are stated in the Declaration of Independence as "self-evident" truths and "inalienable," that is, rights we all have and that cannot be taken from us in other than carefully circumscribed ways. Among the "unalienable Rights" listed in the Declaration are: "Life, Liberty and the pursuit of Happiness." Logic would suggest that it is not a coincidence that "life" is listed first, since it is necessary to be alive to enjoy liberty and the pursuit of happiness.

The Universal Meaning of Due Process Was Reaffirmed in the Fourteenth Amendment

Preparation of the Due Process clause of the 14th Amendment confirms the intentional use of the words "no person" in the Fifth Amendment and "any person" in the Fourteenth to convey universal coverage of all people. John A. Bingham authored this section of the Fourteenth Amendment.

In 1862, Bingham had argued that the Fifth Amendment, properly read, prohibited slavery in the District of Columbia because the Fifth Amendment protected the life and liberty of all "persons," "whether born free or bond," "no matter whether citizens or strangers," and the Amendment thus "was a new gospel to mankind." *See Cong. Globe*, 37th Cong., 2d Sess. 1638 (1862). In fact, Bingham argued:

> "No matter upon what spot of the earth's surface they were born; no matter whether an Asiatic or African, a European or an American sun first burned upon them; no matter whether strong or weak, this new Magna Charta to mankind

> declares the rights of all to life and liberty and property are equal before the law;. . . ."

Cong. Globe, 37th Cong., 2d Sess. 1638 (April 11, 1862). See Richard Aynes, "The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment," 36 Akron L. Rev. 589, 608 (2003).

The Thirty-Ninth Congress passed the joint resolution for the Fourteenth Amendment in 1866. But earlier in that session it had limited the 1866 Civil Rights Act's protections to only "citizens." Bingham objected to the bill, and ultimately voted against it, in part because it "commit[ed] the terrible enormity" of granting protection to citizens while denying it to non-citizens:

> "The great men who made [the Fifth Amendment] when they undertook to make provision . . . for the security of the universal rights of man, abolished the narrow and limited phrase of the old Magna Charta . . . which gave the protection of the laws only to "free men" and inserted in its stead the more comprehensive words "no person;" thereby obeying that higher law given by a voice out of heaven: "Ye shall have the same law for the stranger as for one of your own country." [*Leviticus*, 24:22] Thus, in respect to life and liberty and property, the people by their Constitution declared the equality of all men, and by express limitation forbade the Government of the United States from making any discrimination . . . . Your Constitution says "no person," not "no citizen," "shall be deprived of life, liberty, or property," without due process of law." *Cong. Globe*, 39th

Cong., 1st Sess. 1292 (1866) (debate on the 1866 Civil Rights Act).

Bingham stated that he had copied the due process clause from the 5th amendment. *Cong. Globe*, 39th Cong., 2nd Sess. 1034 (1866).

When interrupted while speaking on the floor of the House of Representatives by an unfriendly question about the meaning of the due process clause from Democratic Representative and Joint Committee on Reconstruction member, Andrew Jackson Rogers (D-N.J.), who later voted against the adoption of the Fourteenth Amendment, Bingham's terse response indicated that it was identical to that of the fifth amendment: "courts have settled that long ago, and the gentleman can go and read their decisions." *Cong. Globe*, 39th Cong., 1st Sess. 1088 (1866). According to Professor Amar, "In 1866, the definitive statement of the meaning of the Fifth Amendment's due process clause was the decade-old case of Murray's Lessee v. Hoboken Land & Improvement Co. . . ." Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment," 101 Yale L. J. 1193, 1225-1226 (1992).

Indeed, in a February 1866 speech concerning an earlier version of the 14th amendment, Bingham said that "every word" in that version of the amendment, except for the enforcement clause, was already in the Constitution and made specific reference to the due process clause of the 5th Amendment, which he quoted. *Cong. Globe*, 39th Cong., 1st Sess., 1034 (1866). Portions of this exchange were quoted by seven-term Congressman John F. Farnsworth(R-Ill.) and lawyer in an 1871 debate. *Cong. Globe*, 42nd Cong., 1st Sess. Appendix 125 (1871). This same point was made by the

Chair of Senate Judiciary Committee, Lyman Trumbull (R-Ill) indicated that the due process clause of the 14th amendment was the same as that of the 5th amendment and the major change was that it was now to be enforced against the states. *Cong. Globe*, 42nd Congress, 1st Sess. 577 (1871)(discussion of KKK Act).

In drafting Section 1 of the Fourteenth Amendment, Bingham borrowed the expansive term "person" from the Fifth Amendment in order to extend protections equally to "all persons, whether citizens or strangers." *Id.* at 1090 (debate on the Fourteenth Amendment).

Bingham also drafted the Equal Protection Clause of the Fourteenth Amendment so that it required equal protection of all "persons" rather than only all "citizens," intentionally advancing human rights beyond Great Britain's Magna Charta, which protected the rights of only "freemen."[10]

In the subsequent debate on the joint resolution for the Fourteenth Amendment, Bingham similarly asserted that, in using the term "persons," the clause guaranteed that "all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and

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[10] Early drafts of what became the equal protection clause of the Fourteenth Amendment guaranteed equality only to "citizens." Bingham intentionally changed the word "citizen" to "person." *Cong. Globe*, 40th Cong., 1st Sess. 542 (1867) ("By that great law of ours it is not to be inquired whether a man is 'free' by the laws of England; it is only to be inquired is he a man, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty.").

liberty and property." *Cong. Globe*, 39th Cong., 1st Sess. 1090 (February 28, 1866). The term "strangers" was a Biblical one meaning aliens. See Exodus 22:21[11]

Thus, it is not surprising that these two identical phrases are treated as being identical by this Court. Justice Frankfurter wrote that: "To suppose that 'due process' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejections." *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring). Especially because the Framers of the Fourteenth Amendment drew on the Fifth Amendment for the meaning of the term "person," that term should be given the same interpretation when courts construe the Fifth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 769 (2010) (the understanding of Bill of Rights by those involved in its creation is "powerful evidence" of their proper scope and meaning). With respect to fundamental rights—such as the right to life—the Founders and Framers established a strong presumption that the Fifth Amendment treats citizens and non-citizens equally. It should also be noted that this is a term which is also gender neutral, applying to both men and women.

In July 1867, during a debate over Reconstruction, Congressman John A. Bingham pointed out the "marked difference" between some versions of the "Magna Charta of England . . . and the Magna Charta

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[11] (United States Conference of Catholic Bishops version)("You shall not oppress or afflict a resident alien, for you were once aliens residing in the land of Egypt.") (King James): ("Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt.")

of the United States" which was how he referred to the Fifth Amendment due process clause. He noted that by providing protection to "freeman" the English Magna Charta excluded one-half of the population of England at the time it was adopted. Then Bingham pointed out that the fifth amendment of the United States had no such limitation, because the Fifth Amendment, reads instead "no person shall. . ." To make the point clear, Bingham proceeded to indicate that under U.S. law the inquiry was not whether one was "free", but rather only whether one "was a man. . ."

> "It is not to be inquired, sir, when any man invokes the majesty of American law in defense of his rights, whether a European, an African, or an Asiatic sun first looked down upon him . . . Before the great law the only question to be asked of the creature claiming its protection is this: Is he a man? Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal. . ."

Cong. Globe, 40th Cong., 1st. Sess. 542 (1867).

The history of the due process clauses confirms that substantive due process guarantees, as applied to fundamental rights, extend equally to citizens and non-citizens. In making this guarantee applicable to the States, the Framers of the Fourteenth Amendment insisted that the term "person" generally prohibits any distinction between citizens and non-citizens as to fundamental rights.

II. Dual Roles of the Due Process Clauses

Both the Fifth and Fourteenth Amendment Due Process Clauses perform two separate tasks: (1) they attempt to protect individuals (2) by restraining the government and its agents. As this Court articulated in *Daniels v. Williams*, 474 U.S. 327, 331-332 (1986), "the Due Process Clause, like its forebear in the Magna Charta," see [Edwin S.] Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911), was "intended to secure the individual from the arbitrary exercise of the powers of government," *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 4 Wheat. 235, 244 (1819)). *See also Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)"); . . . By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, *e.g.*, *Rochin* [*v. California*, 342 U.S. 165 (1952)(pumping a suspect's stomach] it serves to prevent governmental power from being "used for purposes of oppression," *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856) (discussing Due Process Clause of Fifth Amendment)." (emphasis added) Similarly, Justice William Johnson, in *Bank of Columbia v. Okey*, 17 U.S. (4 Wheat.) 235, 244 (1819) wrote that when the words of the Magna Charta were inserted into the Maryland Constitution,

"they were intended to secure the individual from the arbitrary exercise of the powers of government. . ."

The Bill of Rights was designed as a two-edged sword: it not only provides protection for individuals, it also provides that protection by restraining government actors. As Chief Justice John Marshall wrote in *Barron v. Baltimore,* 32 U.S. 243, 247 (1833):

> "The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments, framed by different persons and for different purposes."
>
> "If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government." (emphasis added).

Thus the Due Process Clause both protects the potential victim and restrains the government agent.

CONCLUSION

The due process clauses of the U.S. Constitution were deliberately inclusive so that everyone is protected from arbitrary and harmful action of the government or its agents. The language of the Fifth Amendment provides no basis for exclusion of responsibility for shooting by a U.S. agent of the federal government on U.S. soil of a Mexican national nearby, on the other side of the border in an area under constant surveillance by U.S. border agents. The killing of a fifteen-year-old boy by a government agent without reason to suspect any cause for the use of deadly force is the very definition of the "arbitrary exercise of government power."

Because the very purpose of the 5th Amendment due process is to prevent such arbitrariness by a government agent, one goal of the U.S. Constitution's 5th Amendment is to hold the agent accountable for his arbitrary and unjustified action. The Fifth Amendment is not limited in its application to citizens and, indeed, contemplates protecting all "person[s]."

Respectfully Submitted,

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No. 15-118

In the Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF MEXICAN JURISTS, PRACTITIONERS, AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Mexican jurists, practitioners, and scholars, who respectfully submit this brief in support of Petitioners.

Amici consist of the Honorable Guillermo Iberio Ortiz Mayagoitia, former Chief Justice of the Mexican Supreme Court and Of Counsel of Von Wobeser y Sierra, S.C.; the Honorable Bernardo Sepúlveda Amor, former Mexican Ambassador to the United States and the United Kingdom, former Secretary of Foreign Affairs of Mexico, former Judge and Vice President of the International Court of Justice, and Professor of Law at El Colegio de México; Raúl Contreras Bustamante, Dean of the Law School of Universidad Nacional Autónoma de México (UNAM); José Joaquín Zapata Altamirano, Partner at Zapata Velasco Gómez Mont and Professor at Escuela Libre de Derecho; Pedro Salazar Ugarte, Professor and Director of the Institute of Legal Studies (Instituto de Investigaciones Jurídicas) at UNAM; Fernando Del Castillo E, Partner at Santamarina y Steta; Luis Enrique Graham, Partner at Hogan Lovells; Juan Francisco Torres Landa R, Partner at Hogan Lovells; Tania Gabriela Rodríguez Huerta, Professor at the Instituto Tecnológico Autónomo de México (ITAM); Oscar Fernando Vázquez Cardozo, Partner at Vázquez

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[1] All parties have consented to the filing of this *amici curiae* brief pursuant to Rule 37.3 of the Rules of the Supreme Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

Cardozo Abogados, S.C. and Professor of Law at ITAM; Julieta Ovalle Piedra, Partner at Bufete Ovalle Favela, S.C.; Gabriel Cavazos Villanueva, Professor at the Escuela de Ciencias Sociales y Gobierno del Instituto Tecnológico y de Estudios Superior de Monterrey (ITESM); Raúl González Salas Campos, Attorney and Member of the Mexican Academy of Penal Science; Luis Manuel Jardón-Piña, Lecturer at the Law School of the Centro de Investigación y Docencia Económicas (CIDE); Juan Carlos Zamora-Müller, Attorney at Baker & McKenzie and Professor at the Law School of CIDE; and Leyla Bello-Escobar, Attorney at Baker & McKenzie.

Together, *amici* bring a wealth of experience and are well-respected experts in the fields of Mexican criminal law, civil procedure, constitutional law, and remedies.

Amici submit this brief in response to a misunderstanding of Mexican law asserted by the United States in its Brief in Opposition. Beyond *amici*'s interest in objectively correcting the record in this case, they are also some of the many members of the Mexican legal community with grave concerns about the nature, frequency, and unremedied state of violence at Mexico's border with the United States. *Amici* urge the Court to consider the consequences of failing to provide the Hernández family with a remedy.

SUMMARY OF ARGUMENT

Contrary to suggestions by the United States, a Mexican court will not be able to provide one of its citizens a remedy against Agent Mesa. A Mexican criminal court's ability to pursue an ordinary criminal,

or supplementary civil, action against any individual who is not present in Mexico would require the defendant to voluntarily submit to the criminal court's jurisdiction. Meanwhile, both state and federal codes bar a civil court's jurisdiction to hear a claim against a defendant domiciled outside Mexico, even when the injury occurs inside Mexico. Even in the unlikely event that a Mexican court could maintain jurisdiction, respect for the United States' sovereign immunity would bar any court proceedings in Mexico against Agent Mesa, as the agent of a foreign state.

ARGUMENT

The first step in analyzing whether this Court should recognize a private cause of action under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), is determining "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). While the United States has asserted in this case that "the Mexican courts have jurisdiction over any tort or crime arising from a fatal injury in Mexico," Brief for the United States in Opposition at 7, *Hernández v. Mesa*, No. 15-118, 2016 WL 806897, this ignores the fact that Mexican courts lack jurisdiction over *the defendant*. *Amici* submit this brief to provide the Court with a complete understanding of applicable Mexican law, specifically as to the definitive limitations that foreclose relief to the Hernández family or any similarly situated plaintiff in Mexico.

As presented in the analysis below, the Hernández family has no avenue for recourse against Agent Mesa

in Mexico because Mexican criminal and civil courts lack capacity to proceed against Agent Mesa and, even if they did have such capacity, Agent Mesa would be immune from suit in Mexico. Here, as in *Bivens*, it is "damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). Indeed, even if an avenue of relief were available under Mexican law, a remedy obtained there would be fruitless. Unless Agent Mesa has property in Mexico against which a Mexican judgment could be enforced, the Hernández family would not be able to enforce their judgment there, nor would they be able to enforce such a judgment in the courts of the United States.

I. A Mexican Court Has Authority to Impose a Remedy for the Unlawful Killing of a Mexican Citizen by a Foreign Citizen Only to the Extent that the Foreign Citizen Submits to the Court's Jurisdiction

As a general matter, Mexican civil courts hear cases regarding relations among natural persons, such as family law, contracts, and damages, whereas Mexican criminal courts hear cases that arise from violations of the state or federal penal code. Under ordinary circumstances, both criminal and civil courts are competent to hear claims for damages against a defendant accused of committing a tortious or criminal act.

Under the Mexican Constitution, a victim of a crime has a fundamental right to "reparation [for] the damage suffered." Political Constitution of the United Mexican States (Mexican Constitution) Art. 20(c)(iv). In order to ensure respect for this fundamental right, federal legislators, "for reasons of procedural economy,

allow criminal judges to hear civil liability actions derived from a criminal act."[2] However, the instant case presents a situation where neither a civil nor criminal court would have authority to hear a claim for damages.

A. Mexican Federal Criminal Law Precludes Criminal Proceedings Where a Defendant is Not Physically Present in Mexico

Article 2 of the Federal Criminal Code of Mexico specifies that it shall apply to "crimes that are initiated, prepared or committed abroad, when they produce or intend to have an effect in Mexico." Mexican Federal Criminal Code, Art. 2(i). Article 2 is the only basis for cross-border criminal jurisdiction under Mexican law. Because Agent Mesa's actions were initiated within Texas, and produced an effect in Mexico, the Federal Criminal Code applies to the facts of this case.

Article 4 of the Federal Criminal Code provides Mexican federal courts with the capacity to hear actions under Article 2. Specifically, a federal criminal court's capacity to hear such a case exists only when all of the following elements are present: (i) the defendant is in Mexico; (ii) the defendant has not been definitively tried in the country where he committed the crime; and (iii) the alleged infraction constitutes a crime both in

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[2] *Responsibilidad Civil. Competencia para Conocer de la Derivada del Delito*, Tribunal Colegiados de Circuito (Federal Circuit Court), Federal Judicial Weekly Report, Volume XIV, Thesis 2002190. I.4o.C.14 C (10a.), pg. 1932 (2012), http://200.38.163.178/sjfsist/Documentos/Tesis/2002/2002190.pdf.

the country where it was committed and in Mexico. Mexican Federal Criminal Code, Art. 4.

Where, as here, a federal criminal court lacks capacity to hear a case under Article 4(i) because the defendant is not physically present in Mexico, criminal proceedings that might otherwise be brought are suspended until such time as the court can obtain personal jurisdiction over the defendant. In short, the Hernández family will not have any right to seek redress against Agent Mesa in a Mexican criminal court as long as he avoids traveling to Mexico.

The United States has denied Mexico's request for extradition of Agent Mesa. The analysis presented here accordingly assumes that Agent Mesa will not travel to Mexico voluntarily, the only other means by which he could subject himself to the jurisdiction of Mexican federal criminal courts. Unless Agent Mesa travels to Mexico, any criminal proceedings against him will remain suspended—or may be dismissed in the interim—meaning that Mexican criminal courts will lack capacity to render a judgment or grant a remedy to the Hernández family. *Id.* As a result, no Mexican court has jurisdiction to impose criminal penalties on Agent Mesa, and the Hernández family is unable to pursue related private damages in a Mexican criminal court.

B. Mexican Civil Courts Do Not Have Jurisdiction over Agents of Foreign Sovereigns Who Are Not Domiciled in Mexico

When, as in the instant case, a criminal court is unable to grant damages for reasons unrelated to the

ultimate liability of the defendant, Article 34 of the Federal Criminal Code provides that the plaintiff may under certain circumstances seek damages in civil court. Mexican Federal Criminal Code, Art. 34; *see also* Mexican Federal Civil Code, Art. 1915 (providing the basis for a Mexican civil court to grant damages). Thus, a victim or his survivors may seek damages in the form of reparations for what the Mexican legal system describes as "an unlawful act." Mexican Federal Civil Code, Art. 1910.[3] The actions of Agent Mesa, as alleged in Petitioners' complaint, clearly rise to the level of a criminal offense under the Federal Criminal Code, and would therefore constitute an unlawful act.

Under the Mexican Constitution, federal courts have jurisdiction over controversies arising from the application and enforcement of federal law. Mexican Constitution, Art. 104(ii). However, when a civil controversy affects only the interests of private parties, the Mexican Constitution provides that a plaintiff may file in either federal or state court. *See id.* (providing for concurrent federal and state court jurisdiction). The "interests of private parties" include claims for damages resulting from bodily injury or death. Thus, a civil action could ordinarily be filed in either Chihuahua state court (the state where Sergio Hernández was shot and killed by Agent Mesa) or Mexican federal court. The Mexican Federal Civil Code

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[3] Mexican Federal Civil Code, Art. 1910 ("Anyone who acts unlawfully or against good customs and causes harm to another is obliged to repair the harm, unless it is proven that the damage occurred as a result of the inexcusable fault or negligence of the victim.").

and Chihuahua Civil Code are substantively similar for purposes of this case, and would both preclude Petitioners from having their day in court on their claim against Agent Mesa for the reasons set forth below. *See* Mexican Federal Civil Code, Art. 1915–16; Chihuahua Civil Code, Art. 1800–01; Mexican Federal Code of Civil Procedure, Art. 24(iv); Chihuahua Code of Civil Procedure, Art. 167(iv).

1. Mexican Civil Law Limits Jurisdiction to Courts Sitting in the Domicile of the Defendant

Federal law and Chihuahua state law both require that claims be filed with a competent authority. Mexican Federal Code of Civil Procedure, Art. 14; Chihuahua Code of Civil Procedure, Art. 161. At issue here is the standard, mandated by state and federal civil law, for there to be a "competent authority" with respect to personal private actions seeking damages. Under both the Federal Code of Civil Procedure and the Chihuahua Code of Civil Procedure, the "competent authority" for a claim sounding in personal injury or wrongful death is the court sitting in the domicile of the defendant. Mexican Federal Code of Civil Procedure, Art. 24(iv); Chihuahua Code of Civil Procedure, Art. 167(iv). That is, only a court sitting in the defendant's state of domicile is competent to hear a civil action for damages.

As a result, Mexican civil courts will inevitably lack jurisdiction to hear civil claims of the type the Hernández family has against defendants domiciled outside Mexico. *See* Mexican Federal Code of Civil Procedure, Art. 24(iv). As Agent Mesa is domiciled

outside Mexico, no Mexican civil court has jurisdiction to hear Petitioners' claim against him.

In its *amicus* brief, the Mexican government correctly states that, "when an illegal act is committed in one country and has a direct effect in another country . . . both countries have jurisdiction." Brief of the Government of the United Mexican States as *Amicus Curiae* in Support of the Petitioners at 10, *Hernández v. Mesa*, No. 15-118 (on petition for writ of certiorari) 2015 WL 5071997. However, it is necessary to distinguish between a Mexican court's jurisdiction and its capacity to proceed, which function for these purposes similarly to the distinction between subject matter jurisdiction and personal jurisdiction under U.S. law. For example, while the Federal Criminal Code grants jurisdiction to hear cases fitting the subject matter described in the Code, it also deprives Mexican courts of capacity to proceed with such cases when the defendant is not present in Mexico. This distinction explains why the Mexican government's *amicus* brief, after stating that a Mexican court could have jurisdiction, also concludes that "if Agent Mesa avoids travel to Mexico, any effective and enforceable remedy against him can only come from the U.S. courts." *Id.* at 11.

2. Mexican Law Provides Immunity to Agents of Foreign Sovereigns, and that Immunity Extends to Agent Mesa

A Mexican court is further unable to provide a remedy to Petitioners in light of the fact that Agent Mesa, as an agent of a foreign state, would be entitled to jurisdictional immunity from any civil action brought in Mexico.

In accordance with a widely accepted principle of public international law, Mexico grants jurisdictional immunity to foreign sovereigns, thereby depriving its courts of jurisdiction to sit in judgment of the acts of a sovereign power.[4] This principle, while not unlimited, applies broadly in determining what entities and individuals fall under the umbrella of a foreign sovereign. Accordingly, when a claim is levied against a foreign sovereign, an instrumentality of the sovereign, or an individual acting in his or her official capacity, the default position of Mexican courts is to grant immunity.[5]

At the time of the shooting, Agent Mesa was on duty and actively serving within the scope of his employment. Moreover, the United States exercised its prerogative to substitute itself for Agent Mesa under the Westfall Act for Petitioners' non-constitutional claims against him. On these facts, and in light of the wide scope given to sovereign immunity principles with respect to a foreign state's actors, a Mexican court would conclude that Agent Mesa had acted within the

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[4] *Inmunidad Jurisdiccional Internacional. No Es Prerrogativa Ilimitada*, Second Chamber of the Mexican Supreme Court of Justice of the Nation, Federal Judicial Weekly Report, IV Administrativa Primera Parte, Jurisprudence 1007037, pg. 141 (2011), http://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/1007/1007037.pdf.

[5] *See* Case No. 17498, Amparo en Revisión 348/2001, Second Chamber of the Mexican Supreme Court of Justice of the Nation, Federal Judicial Weekly Report, Volume XVII, pg. 55–57 (2003) (citing Loretta Ortiz Ahlf, *Mexican Practice in Immunity*, *in* Derecho Internacional Público § 7.4, pg. 129 (Harla 2d ed. 1993)), http://sjf.scjn.gob.mx/sjfsist/ Documentos/Ejecutorias/17498.pdf.

scope of his official capacity. Accordingly, a Mexican court would be obliged to immunize Agent Mesa from independent private-actor liability in light of his status as an agent of a foreign state.

II. Even Assuming Petitioners Could Obtain a Judgment from a Mexican Court, a Texas Court Would Not Enforce the Judgment Against Agent Mesa

Even if Petitioners were to obtain an adequate judgment in Mexico, it is unlikely that such a judgment would provide an enforceable remedy. Presumably, Agent Mesa does not hold property in Mexico that could be used to satisfy a Mexican judgment. Accordingly, Petitioners would need to resort to the judgment recognition and enforcement mechanisms available under the relevant U.S. state law, presumably Texas, where Agent Mesa resides. While *amici* do not purport to speak to the full contours of U.S. state and federal law, they address below two aspects of Texas law as to which the application of Mexican law is particularly relevant.

Any proceeding to enforce a Mexican judgment, whether in state or federal court, would be governed by Texas law.[6] Once a judgment creditor has filed a foreign country judgment that is, on its face, "final and conclusive and enforceable where rendered," enforcement is governed by Texas's implementation of

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[6] 28 U.S.C. § 1442(a)(1) provides federal officials with a right of removal to federal court. With respect to choice-of-law principles, a federal court sits in diversity where jurisdiction is derived from § 1442(a)(1). *See Winters v. Diamond Shamrock Chem. Co.*, 941 F. Supp. 617, 620 (E.D. Tex. 1996), *aff'd*, 149 F.3d 387 (5th Cir. 1998).

the Uniform Foreign Country Money-Judgments Recognition Act. Tex. Civ. Prac. & Rem. Code Ann. §§ 36.002, 36.001–008 (West 2012) [hereinafter Texas Recognition Act]. Although defendants bear the burden of demonstrating why such a judgment should not be enforced, the Texas Recognition Act offers ten grounds for non-recognition that, if present, preclude or otherwise counsel against enforcement of a foreign court's judgment in Texas. Texas Recognition Act § 36.005.

A number of these enumerated grounds would apply in this context, rendering the prospect of enforcement of a Mexican judgment against Agent Mesa in Texas simply implausible. The following describes those issues where Mexican law and practice bear particular relevance.

First, it is well-established that the absence of a foreign court's personal jurisdiction over the judgment debtor renders any resulting judgment void, and precludes a state or federal court from enforcing it. Restatement (Third) of Foreign Relations Law of the United States § 482(1)(b) (1987). As described above, Mexican law provides no reasonable basis for either a Mexican criminal or civil court to assert jurisdiction over Agent Mesa with respect to damages claims. Even if a court were to find grounds to exercise jurisdiction, a Texas court hearing a claim for enforcement may "scrutinize the basis for asserting jurisdiction . . . on its merits." Restatement (Third) of Foreign Relations Law of the United States § 482 cmt. c (1987).

The Texas Recognition Act also provides that a court hearing an enforcement claim has discretion to decline to enforce a foreign country judgment if the

underlying cause of action is repugnant to Texas public policy. Texas Recognition Act § 36.005; *see also Southwest Livestock & Trucking Co., Inc. v. Ramón*, 169 F.3d 317, 321 (5th Cir. 1999) (considering whether Mexican usury laws are repugnant to Texas public policy). Mexican courts will treat claims against U.S. government agents acting in their official capacities as void for lack of jurisdiction. *See supra* Part I. Accordingly, an action brought under Mexican law, and enforced in a U.S. court against that same federal official, would seem to run afoul of the United States' sovereign immunity. Unless it were within the scope of Texas public policy to enforce the judgments of foreign nations against U.S. federal agents acting in their official capacities, then enforcement of any judgment Petitioners could obtain would almost certainly violate Texas public policy.

CONCLUSION

Mexican law provides victims of cross-border violence no avenue for relief in Mexican courts against defendants like Agent Mesa. Defendants such as Agent Mesa, who are neither present nor domiciled in Mexico, are not subject to the jurisdiction of Mexican courts. Furthermore, officers of the United States acting in their official capacity are immune from suit in Mexican courts. For these reasons, the Hernández family has no remedy against Agent Mesa in the courts of Mexico.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JESUS C. HERNANDEZ, ET AL.,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS JAMES E. PFANDER, CARLOS M. VÁZQUEZ, AND ANYA BERNSTEIN IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are law professors whose research and teaching focus on federal jurisdiction, and, specifically, this Court's *Bivens* jurisprudence. They file this brief to urge the Court to reverse the Fifth Circuit and recognize Petitioners' right to sue Agent Mesa for his unjustified use of force. *Amici* are:

James E. Pfander, the Owen L. Coon Professor of Law at Northwestern Pritzker School of Law, has written extensively on federal and state sovereign immunity, the early republic origins of official liability and indemnity, *Bivens* litigation, and the modern law of qualified immunity. A member of the American Law Institute, Pfander has served as the chair of the sections on civil procedure and federal jurisdiction of the Association of American Law Schools. He teaches conflicts of law and federal jurisdiction, among other subjects. His latest book, Constitutional Torts and the War on Terror (Oxford University Press) will appear in early 2017.

Carlos M. Vázquez is Professor of Law at Georgetown University Law Center. He has written extensively on sovereign immunity and official liability for constitutional violations, including *Bivens* claims, as well as the extraterritorial applicability of federal law. He is a member of the American Law Institute and serves as an adviser to the current Re-

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae and its counsel, made any monetary contribution towards the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for both Petitioners and Respondent were notified of the intent to file this brief and the parties' letters of consent have been filed with the Clerk's office.

statement (Fourth) of Foreign Relations Law project. He has also served as chair of the Federal Courts section of the Association of American Law Schools. He teaches Federal Courts and the Federal System, Conflict of Laws, and Transnational Litigation, among other courses.

Anya Bernstein is Associate Professor of Law at SUNY Buffalo Law School. She has written about *Bivens* actions and congressional legislation; statutory interpretation; and administrative law and practice in the United States and in comparative perspective. She teaches civil procedure, administrative law, and legislation.

SUMMARY OF THE ARGUMENT

In *Boumediene* v. *Bush*, 553 U.S. 723, 771 (2008), this Court held that the Constitution's prohibition against suspension of the writ of habeas corpus "has full effect" at Guantanamo Bay, assuring judicial review of the claims of foreign nationals whom the government had seized and detained on foreign soil. Here, Jesus Mesa, acting in the course and scope of his employment for the U.S. Customs and Border Protection, seized Sergio Hernandez, a foreign national, in apparent violation of the Fourth Amendment's prohibition on the use of excessive force. No other country can regulate Agent Mesa's conduct in the United States and no other country's law offers Hernandez a clear remedy for the conduct at issue. Judged under the "practical" standard articulated in *Boumediene*, the Constitution governs Agent Mesa's actions along the border. Rejecting narrow territoriality, the *Boumediene* Court evaluated the nature and locus of the federal government's activities and the prospect that the application of federal constitu-

tional law would conflict with the laws of another country. Judged by the standard of *Boumediene*, the Fourth Amendment likewise governs Agent Mesa's decision to shoot Hernandez as he stood across the border in Mexico.

Centuries of common law developments in England and the United States confirm the lessons of *Boumediene* as to events outside the borders of the nation and underscore the importance of recognizing a right under *Bivens* to recover damages for government invasions of life, liberty, and property. Indeed, this Court's *Bivens* decision builds upon this deeply rooted common law tradition, providing a modern, post-*Erie* framework for the historic availability of damages remedies against federal officials. Although Congress has reshaped the common law tradition in various ways—by allowing garden-variety tort claims to proceed against the federal government itself under the Federal Tort Claims Act and by immunizing federal officials from such garden-variety tort liability in the Westfall Act—it has taken no steps to displace the *Bivens* right to sue for constitutional torts claims such as the one involved in this case. To the contrary, Congress has chosen explicitly to preserve the *Bivens* action for constitutional tort claims as the successor to the common law tradition of official liability.

Congress took this action most decisively in 1988, with the enactment of the Westfall Act. That Act immunized federal officials acting in their official capacity from state law tort claims. At the same time, the Westfall Act provided that the federal government was to be substituted as defendant in any such state law actions, thereby transforming such claims into proceedings governed by the FTCA. Congress, howev-

er, carved out claims brought against federal officials for "violations of the Constitution" from both provisions. Thus, Congress made no provision for the assertion of constitutional claims against the government under the FTCA, thereby retaining federal immunity from suit for such claims. In addition, Congress expressly provided that such constitutional tort claims should proceed, as recognized in *Bivens*, as suits brought against the officer in his or her personal capacity. This combination of congressional actions—eliminating the routinely available state common law action and expressly preserving constitutional tort claims—means that the *Bivens* claim provides the sole remedy for constitutional torts and the remedy Congress apparently chose as best adapted to the broader scheme of remedies.

By placing the *Bivens* action within a firm statutory framework, Congress effectively ratified the *Bivens* action as the only available remedy for constitutional torts. Congressional ratification should play a role in this Court's evaluation of the availability of a *Bivens* action. So long as this Court finds that the Constitution regulates the federal conduct at issue, the Westfall Act confirms that a *Bivens* action may proceed. This does not mean, needless to say, that every claimed constitutional violation will proceed to the merits. Established doctrines, including qualified immunity, impose important limits on such litigation. But it does mean that, in giving effect to the congressional design, this Court no longer need worry that the recognition of a right to sue improperly invades the legislative sphere.

In the present case, the absence of any remedial alternative—whether domestic or foreign—suggests that Petitioners indeed have a right to sue Agent Me-

sa for his use of excessive force in contravention of the Fourth Amendment's prohibition on unreasonable seizures. This Court has previously confirmed the availability of a *Bivens* action to redress Fourth Amendment violations and nothing in the context of this litigation calls for a different analysis.

ARGUMENT

I. THE FOURTH AMENDMENT GOVERNS MESA'S CONDUCT ALONG THE MEXICAN BORDER.

Federal officers acting within the United States, such as Agent Mesa, remain presumptively subject to the law of the United States. When a federal officer takes action overseas—or, as here, his conduct has overseas effects—and there is no conflict between U.S. and foreign law regarding the applicability of our constitutional principles, then this Court has applied the relevant constitutional rule with full effect. *Boumediene*, 553 U.S. at 755 (finding dispositive the "fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over" Guantanamo Bay, thus creating no possibility of conflict with Cuba's laws); cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (finding Fourth Amendment's warrant requirement inapplicable to search conducted in Mexico because a genuine conflict between the two countries' laws meant that projecting U.S. law into Mexico would be "impracticable and anomalous").[2]

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[2] *Verdugo-Urquidez* refused to apply the warrant requirement to a search conducted in Mexico but did not address the situation here. *See Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) (concluding that "the Constitution

Here, as in *Boumediene*, applying the Constitution[3] to Agent Mesa's conduct presents no threat of conflict between the laws of the United States and Mexico. Even a cursory review reveals that Mexican law bars the unjustified use of deadly force.[4] Indeed, Mexican authorities asked the United States to extradite Agent Mesa to face criminal charges in Mexico, evidence that Mexico regards Agent Mesa's actions as unlawful. Because the unjustified use of force was prohibited under both Mexican and U.S. law, application of the Fourth Amendment's unreasonable-seizures provision in this case poses no threat of conflict.[5]

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does not require United States agents to obtain a warrant when searching the foreign home of a nonresident alien.").

[3] This brief focuses exclusively on the Fourth Amendment, though Petitioners are correct that the Fifth Amendment also applies to Agent Mesa's conduct.

[4] Mexico's Constitution prohibits such conduct by law enforcement officials in Mexico. *E.g.*, Political Constitution of the United Mexican States, http://portal.te.gob.mx/sites/default/files/consultas/2012/04/political_constitution_v2_pdf_20009.pdf (last visited Dec. 8, 2016), art. 1 (guaranteeing that "all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights"); *id.* art. 29 (proscribing the restriction or suspension of "the right to life"); *id.* art. 21 (requiring "institutions in charge of public security" to respect these human rights); *id.* art. 1 (requiring government to "prevent, investigate, penalize and redress violations to the human rights").

[5] Although finding de facto American sovereignty over the culvert would further tip the scales in favor of applying the Fourth Amendment here, this Court need not go so far given the obvious lack of conflict between plausibly applicable laws in the United States and Mexico.

II. ENGLISH AND AMERICAN COMMON LAW HISTORICALLY RECOGNIZED A RIGHT TO SUE PUBLIC OFFICIALS FOR RIGHTS VIOLATIONS HOME AND ABROAD.

The common law tradition forged by Lord Mansfield, President James Madison, Justice Joseph Story, and Chief Justice John Marshall recognized, as a routine matter, public-official personal liability for tortious conduct against citizens and foreign nationals alike. Subsequent indemnification by private bill would protect the personal financial interests of the official while providing the injured party with due compensation. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1865–66 (2010). *Bivens* and the modern practice of routine indemnification are the natural extension of this well-established presumption favoring vindication of rights violations attributable to improper official conduct.

Indeed, *Bivens* can be best understood as providing a federal right to sue that builds on the common law past and tailors the right for use in a post-*Erie* world. See James E. Pfander, Iqbal, Bivens, *and the Role of Judge-Made Law in Constitutional Litigation*, 114 Penn St. L. Rev. 1387, 1415 (2010) ("*Erie* created the very real possibility that in tort suits aimed at enforcing constitutional rights, both the right to sue the federal official and the incidents of official liability would be governed by state law."); Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. Pa. L. Rev. 509, 541 (2013) (noting that the decision to frame remedial issues in state law terms

after *Erie* "tied" the federal courts to "state precedents" and prevented them from taking account of "the federal interests involved, including the need to give efficacy to the Constitution"); see also James E. Pfander, *The Story of* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, *in* Federal Courts Stories 275, 284–85 (V. Jackson & J. Resnik eds. 2010) (describing impact of *Erie* concerns on the argument over recognition of a right to sue in *Bivens*).

A. English Common Law Tradition.

Common law rights of action against military and government officials under English law predated the American Revolution and permitted individuals to sue English officers whose tortious conduct exceeded official authority. See James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 Cornell L. Rev. 497, 510–12 (2006); see, *e.g.*, *Mostyn* v. *Fabrigas*, 98 Eng. Rep. 1021 (1774) (opinion of Lord Mansfield). Importantly, British officers were subject to suit in English courts even when they acted abroad. See *Mostyn*, 98 Eng. Rep. at 1022 (Minorcan civilian successfully sued English military governor for damages for unlawful detention in and subsequent banishment from Minorca); see also Pfander, *Limits of Habeas Jurisdiction*, *supra* p. 8, at 511 ("[A]djudication by the superior courts at Westminster was seen as essential to prevent a failure of justice" when no alternative remedial forum was available to the injured party); *id.* at 510 ("[C]ivilian courts measured the legality of military and imperial action overseas by reference to the laws of Britain."). An officer could override the presumption in favor of applying English law, but only if he could show that he acted under the sheltering arm of another coun-

try's law that provided greater protections for his conduct. *Mostyn*, 98 Eng. Rep. at 1023.

B. American Tradition Through Early Twentieth Century.

The English tradition of presumptive personal liability for improper official conduct likewise was embraced in the early Republic. Pfander, *Limits of Habeas Jurisdiction*, *supra* p. 8, at 515; see, *e.g.*, *Wise* v. *Withers*, 7 U.S. 331, 337 (1806) (Marshall, C.J.) (upholding award of damages for trespass against military officers who improperly imposed a court martial against a citizen not subject to military jurisdiction). Thus, when a federal officer violated rights to life, liberty or property, the affected individual could seek redress through a common law tort claim against the officer in his personal capacity. For example, a victim of an unlawful search would sue under a trespass theory. If the official argued his conduct was authorized by federal law, the victim could counter that the Fourth Amendment prohibition against unreasonable searches invalidated any such claim of authority. If the court agreed, it would award damages. Officers were not entitled to immunity, but Congress commonly granted the officers' petitions for indemnification. See, *e.g.*, *Little* v. *Barreme*, 6 U.S. 170 (1804) (holding naval captain personally liable for illegal seizure of vessel); *Murray* v. *Schooner Charming Betsy*, 6 U.S. 64, 117 (1804) (same); see also Pfander & Hunt, *supra* p. 7, at 1900–02 (discussing Congress's indemnification of officers found liable in *Little* and *Murray*); David J. Barron & Martin S. Lederman, *The Commander in Chief at Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689, 747 n.181 (2008) (noting $1,000 fine against General Andrew Jackson handed down

by federal court for his unconstitutional declaration of martial law during Battle of New Orleans, President Madison's endorsement of the penalty, and Congress's eventual indemnification of Jackson by private bill).

As with the British officers, routine remediation for harms caused by U.S. government officials extended to conduct beyond the borders of the United States. In the *Apollon*, for example, Justice Story concluded that U.S. revenue law did not authorize federal officials to seize French ships in foreign waters, but that general U.S. tort law did authorize the owners of the French vessel to recover damages from those officials in U.S. courts. 22 U.S. 362 (1824).[6] For Justice Story, applying U.S. revenue law to authorize such seizures would conflict with the settled expectations of maritime nations, interfere with other nations' rights to govern their own trade, and project U.S. regulatory authority beyond the (territorial) limits recognized in the law of nations. No such conflict arose, however, when foreign nationals brought suit in the courts of the United States to recover damages for unlawfully seized vessels. Here, Justice Story recognized that U.S. law was in sync with that of other interested nations (France and Spain), and with that of the law of nations generally: all would expect a country to make good on the loss imposed by its officials' unlawful seizure of another nation's vessel. This universal principle, combined with the long-standing common law presumption in favor of holding public officials accountable for their conduct regardless of location, led Justice Story to conclude that the common law pro-

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[6] Justice Story wrote the *Apollon* long before this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), barred federal courts from applying general common law principles.

vided a remedy for U.S. official conduct in foreign territory. See, *e.g.*, Act for the Relief of Paolo Paoly, ch. 27, 6 Stat. 47 (1802) (paying the judgment against U.S. naval officer who was held liable in damages for illegal seizure of a vessel owned by a foreign national); Act of March 2, 1799, ch. 28, 1 Stat. 723 (1799) (granting legislative indemnity and authorizing payment of compensation to a British national whose vessel had been illegally seized on the high seas by U.S. naval officer); *Maley* v. *Shattuck*, 7 U.S. 458 (1806) (upholding award of damages against U.S. naval officer for unlawful seizure of vessel owned by foreign national); *Little*, 6 U.S. 170 (foreign national entitled to tort damages from U.S. officer acting in violation of law on the high seas); see also Pfander & Hunt, *supra* p. 7, at 1885 n.98 (discussing the Paoly litigation and subsequent indemnification).

In this case, and in other cases involving extraterritorial conduct by executive branch officials, the government invariably asks the judiciary to defer to the executive as to sensitive matters of national security and public policy. But the jurists of the early Republic took the position that the interests of the United States were best served by a thoroughgoing commitment to the principle of remediation for the violation of individual rights. Thus, as Secretary of State during the Quasi-War with France, James Madison worked hard to ensure that aliens injured abroad by U.S. officials could seek redress in U.S. courts. *Letter from James Madison to Peder Blicherolsen* (Apr. 23, 1802), *in* 3 The Papers of James Madison, Secretary of State Series, 152 (D.B. Mattern et al. eds., 1995) (insisting that "injuries committed on aliens as well as citizens, ought to be carried in the first instance at least, before the tribunals to which the aggressors are responsible"); see generally Pfander & Hunt, *supra* p.

7, at 1895–97. Madison thought an effective judicial remedy in the courts of the United States was an important element of U.S. foreign policy.

Justice Story's opinion for the Court in the *Apollon* further underscores the importance of remedies for unlawful executive activity that takes place outside the borders of the United States. Rather than defer to claims of national security, public safety, and necessity, Story insisted that federal courts have a duty to provide suitable redress in these cross-border scenarios:

> It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.

Apollon, 22 U.S. at 366–67. To Story, the extraterritorial nature of federal official misconduct scarcely justified abandoning the presumptive commitment to judicial review as a necessary check on abuses of executive power. Other examples confirm that *The Apollon* accurately represents the presumptive personal liability that applied to federal officials throughout the antebellum period.[7]

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[7] *See* James E. Pfander & Jonathan L. Hunt, *supra* p. 7, at 1932–39 (2010).

The foundations for federal-official tort liability established by James Madison, Justice Story, and Chief Justice Marshall are evident in this Court's cases through the first half of the twentieth century. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 661–62 (1952) (Clark, J., concurring) (recognizing as good law the *Little* principle that a trespass is actionable when it is committed under executive orders without authority); *Yearsley* v. *W.A. Ross Const. Co.*, 309 U.S. 18, 21 (1940) (finding that federal officers can be personally liable for damages when they exceed their authority or "it was not validly conferred"); *Phila. Co.* v. *Stimson*, 223 U.S. 605, 619–20 (1912) ("The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded.") (citations omitted); *Belknap* v. *Schild*, 161 U.S. 10, 18 (1896) ("But the exemption of the United States from judicial process does not protect their officers and agents . . . from being personally liable to an action of tort by a private person whose rights or property they have wrongfully invaded or injured, even by authority of the United States.") (citations omitted); *Bates* v. *Clark*, 95 U.S. 204 (1877) (holding personally liable military officials who followed orders and wrongly seized private property they mistakenly believed was within Indian country). And the logic behind the time-worn system of liability and indemnity remains intact today, modified by the doctrine of qualified immunity. Officers acting in the line of duty were then—and are now—held responsible in the first instance to compensate the injured party, and the government can then absorb the loss by indemnifying the officer. Pfander & Hunt, *supra* p. 7, at 1888–1917, 1925. This historical tradition laid the foundation for *Bivens* v. *Six Unknown Named*

Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and recognition of Petitioners' right to sue would ensure modern constitutional tort jurisprudence remains faithful to founding-era principles.

III. *BIVENS* AND SUBSEQUENT ACTS OF CONGRESS, INCLUDING THE WESTFALL ACT, ARE CONSISTENT WITH THE HISTORIC REGIME OF ROUTINE REMEDIATION FOR CONSTITUTIONAL HARMS INFLICTED BY FEDERAL OFFICIALS.

When this Court decided *Bivens* in 1971, it was against the backdrop of the rich common law tradition detailed above. In fact, this Court found the federal damages-based cause of action that it recognized in *Bivens* "hardly . . . a surprising proposition" and the "ordinary remedy" for these sorts of constitutional violations by federal officers, notwithstanding the continuing availability of state common law remedies at that time. *Bivens*, 403 U.S. at 395. The federal government agreed as well. Br. for the Resp'ts at 40, *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 1970 WL 136799, No. 301 (U.S. Nov. 24, 1970) (noting "the plan envisaged when the Bill of Rights was passed" allowed for a person suffering a constitutional injury to "proceed . . . by a suit at common law . . . for damages for the illegal act"). Although the mechanics have changed, courts applying *Bivens* to modern constitutional tort claims since 1971 have preserved the spirit of common law claims against government officials that existed under English and early American law. See, *e.g.*, *Carlson* v. *Green*, 446 U.S. 14 (1980); *Davis* v. *Passman*, 442 U.S. 228 (1979).

Shortly thereafter, in 1974, Congress began to endorse and ratify this Court's *Bivens* jurisprudence, solidifying its status as the preferred remedy for federal employees' constitutional torts. Congress amended the FTCA to add the federal government as a defendant in certain law-enforcement tort suits. 28 U.S.C. § 2680(h); see also *Carlson*, 446 U.S. at 19–20 n.5 ("[T]he congressional comments accompanying [the FCTA] amendment made it crystal clear that Congress views FCTA and *Bivens* as parallel, complimentary causes of action. . . . In the absence of a contrary expression from Congress, § 2680(h) thus contemplates that victims . . . shall have an action under FCTA against the United States as well as a *Bivens* action against the individual officials . . . .") (internal quotation marks and citation omitted). Concerned that victims of unlawful federal drug raids would be insufficiently compensated under *Bivens* and that *Bivens* actions may fail to adequately deter government wrongdoing, Congress believed that adding the federal government as a defendant would encourage institutional reform. What is clear, however, is that Congress took these measures to *supplement*, not replace, *Bivens* actions. S. Rep. No. 93-588, at 3 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2791 ("[T]his provision should be viewed as a counterpart to the *Bivens* case and its progeny . . . ."); James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 133 (2009) (noting that Congress rejected language proposed by the Department of Justice that "would have eliminated the *Bivens* action altogether in favor of suits against the government for constitutional violations").

Further strengthening *Bivens*, in 1988 Congress passed the Westfall Act. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. Its primary purpose was to preempt nonfederal remedies against federal employees acting within the scope of their employment. See Pfander & Baltmanis, *supra*, at 15. Responding to a unanimous ruling by this Court recognizing the continued viability of state tort claims against federal officers, *Westfall* v. *Erwin*, 484 U.S. 292 (1988),[8] Congress sought to both preserve and narrow the historic regime of common law remediation. To accomplish this goal, the Act grants immunity to the federal officer for claims not based on federal law and substitutes the federal government as a defendant under the Federal Tort Claims Act (FTCA). But the Act carved out a significant exception—for claims "brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A).[9] By exempting claims "brought for a violation of the Constitution of the United States" from this immunity/substitution regime, the Act allowed *Bivens* claims to proceed against the responsible officer. See H.R. Rep. No. 100-700 at 6 (1988) ("Since the Supreme Court's decision in *Bivens*, the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. Consequently, [the Act] would not affect the ability of victims of constitutional torts to seek personal re-

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[8] That case held that absolute immunity did not shield federal employees from common law claims involving nondiscretionary duties.

[9] The second Westfall Act exception, § 2679(b)(2)(B), allowing suits against federal officials for violations of rights conferred by federal statute, does not apply here.

dress from federal employees who allegedly violate their constitutional rights."); see also 134 Cong. Rec. 15,963 (1988) (statement of Rep. Frank) ("We make special provisions here to make clear that the more controversial issue of constitutional torts is not covered by this bill. If you are accused of having violated someone's constitutional rights, this bill does not affect it. You might be individually sued."); Anya Bernstein, *Catch-All Doctrinalism and Judicial Desire*, U. Pa. L. Rev. Online, 221, 223–30 (2013) (exploring the interplay of Westfall Act transformation, substitution, and immunity). Congress effectively chose the officer suit, a remedy recognized in *Bivens* and reflected in centuries of common law development, as the mechanism best suited to remedy alleged constitutional tort violations.

In keeping with the common law tradition of applying the nation's own law to government activity outside the nation's borders, Congress has never sought to limit the routine remediation of constitutional violations to only those injuries occurring on U.S. soil. Unlike the FTCA, which explicitly exempts foreign torts from the statute's waiver of sovereign immunity, 28 U.S.C. § 2680(k), the Westfall Act does not exclude suits for violations of the Constitution that result in an injury overseas. The Westfall Act instead allows for all claims "brought for a violation of the Constitution of the United States" to proceed under the *Bivens* regime. By tying the right to sue to the existence of a constitutional violation, the Westfall Act makes clear that the *Bivens* action follows the Constitution in cases where the Constitution follows the flag.[10]

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[10] The presumption against extraterritorial application of rights conferred by federal statute, *see Kiobel* v. *Royal Dutch*

IV. OTHER INTERPRETIVE PRINCIPLES AND ANALOGOUS STATUTORY REGIMES REINFORCE THE AVAILABILITY OF A *BIVENS* REMEDY.

The argument for recognition of a *Bivens* action is further strengthened by two additional considerations. First, a well-settled presumption favors the availability of *some* adjudicatory forum to vindicate constitutional rights. Second, recognition of a right to sue under *Bivens* and the Westfall Act would ensure the parallel enforcement of constitutional limits on federal and state official action.

First, this Court has established a strong presumption that individuals alleging substantial constitutional claims should have at least one adjudicatory forum—judicial, administrative, or otherwise—in which to press their claim. *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (reading an implied exception for constitutional questions into federal statute to avoid the "serious constitutional question" that would arise if the statute were construed to preclude judicial review of constitutional questions); *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 680–81 n.12 (1986) (interpreting statute in a manner that "avoids the 'serious constitutional question' that would arise if we construed" the statute in question "to deny a judicial forum for constitutional claims"); *Johnson* v.

Petroleum Co., 133 S. Ct. 1659 (2013); *Morrison* v. *National Australia Bank*, 561 U.S. 247 (2010), has no application to the right to sue confirmed in the Westfall Act. *Cf. Meshal* v. *Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015), *petition for cert. filed*, (U.S. May 31, 2016) (No. 15-1461) (applying the *statutory* presumption to suits brought for allegedly *unconstitutional* federal official conduct in Africa). The Westfall Act does not create the rights in question, but confirms the right of individuals to sue for violations of the Constitution.

Robison, 415 U.S. 361, 366–67 (1974) (construing statute to avoid the "serious [constitutional] question[]" of the validity of barring federal courts from deciding constitutionality of veteran's benefits legislation). The Westfall Act makes clear that Congress has chosen the *Bivens* action (as opposed to state common law) as the proper vehicle for the vindication of constitutional rights in cases like this.

Congressional reliance on the *Bivens* action helps to bring federal official liability into line with the state official liability routinely available under § 1983. The two regimes already accord parallel treatment to a range of doctrines. When the Court clarifies the definition of a legally sufficient constitutional claim against a federal officer, the definition applies with equal force to state officers. See *Hartman* v. *Moore*, 547 U.S. 250, 254 n.2 (2006) (specifying elements of malicious prosecution claims in *Bivens* litigation and describing *Bivens* action as the "federal analog to suits brought against state officials" under § 1983). When the Court refines the rules of qualified immunity, it does so recognizing that the rules will apply with equal force to state and federal officials. See *Pearson* v. *Callahan*, 555 U.S. 223 (2009) (treating *Bivens* and § 1983 decisions as interchangeable on subject of qualified immunity); *Butz* v. *Economou*, 438 U.S. 478, 504 (1978) (noting that differences in immunity for state and federal officials are "untenable"). Moreover, "the qualified immunity analysis is identical" under *Bivens* and § 1983. *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999). The Court's uniform application of qualified immunity suggests the balance between holding officials accountable for improper conduct and minimizing the tendency for personal liability to "dampen the ardor" with which officials perform their duties should be the same at the state and

federal levels. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813–14 (1982) (internal citation omitted).. Recognizing that Congress has ratified *Bivens* helps to further ensure equality of treatment of federal and state officials.[11]

Although § 1983 suits lack the threshold right to sue inquiry typical of modern *Bivens* actions, this Court has nonetheless recognized that other federal statutes and doctrines may narrow state officer liability. Incorporation of these standards into *Bivens* would help clarify and standardize public official liability. For example, implied statutory displacement in the § 1983 context might also extend to applicable *Bivens* remedies. See *Fitzgerald* v. *Barnstable School Comm.*, 555 U.S. 246, 252–55 (2009). In *Fitzgerald*, the Court held that the remedial scheme for harassment claims under Title IX did not displace the § 1983 remedy because Congress, in enacting Title IX, had expressed no legislative intent to displace § 1983 claims and had not put in place detailed or more restrictive remedies that would suggest the inapplicability of constitutional tort litigation. *Id.*

The *Fitzgerald* framework nicely accounts for the result in two *Bivens* cases—*Bush* v. *Lucas*, 462 U.S. 367, 388 (1983) and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988). In *Bush* v. *Lucas*, the existence of a comprehensive and elaborate civil service remedial scheme ruled out a *Bivens* remedy to vindicate the violation of a civil servant's First Amendment rights. 462 U.S. at 388–89. Although the Court recognized that a *Bivens* suit could entitle him to a wider range of relief, the civil service remedies were "constitu-

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[11] For a more comprehensive articulation of this argument, *see* Pfander & Baltmanis, *supra* p. 14, at 139–41.

tionally adequate." *Id.* at 378 n.14. The Court relied in large part on Congress's "careful attention to conflicting policy considerations" in devising this "elaborate remedial system." *Id.* at 388.

In *Schweiker*, the Court again found a *Bivens* right to sue for procedural due process displaced by the sophisticated administrative review for Social Security benefit denial claims. 487 U.S. at 418–20. Not only did the plaintiffs receive significant monetary relief, but Congress imposed an exhaustion requirement that funneled disability claims through the administrative process and indicated that other modes of claims-related relief should be prohibited. *Id.* at 424–25; 42 U.S.C. § 405(h) (2006) (identifying administrative scheme as the exclusive mode of review for claims under the statute). Even though the alternative scheme did not provide redress for "the constitutional violation itself," it nonetheless was sufficient to supplant the *Bivens* right to sue. *Schweiker*, 487 U.S. at 427.

This Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), *overruled on other grounds by Daniels* v. *Williams*, 474 U.S. 327 (1986), imposes another important § 1983 limitation that fits well with federal official liability under *Bivens*. In *Parratt*, the Court held that the existence of post-deprivation remedies may obviate procedural due process claims for which § 1983 would otherwise provide a remedy. 451 U.S. at 543–44; *id.* at 538–41 (finding that state tort system provided remedy that vitiated underlying procedural due process claim). In *Schweiker*, the availability of specific relief and recovery of benefits owed could well provide the plaintiff with process constitutionally due under the Fifth Amendment. The same dynamic could apply to all *Bivens* procedural due process

claims—the Court need not reject the availability of such a remedy at the threshold to deny its specific application when post-deprivation remedies address the underlying constitutional claims.[12]

V. APPLYING THESE PRINCIPLES, PETITIONERS HAVE A RIGHT TO SUE MESA IN THE ABSENCE OF AN AVAILABLE ALTERNATE REMEDY.

Bivens and its progeny recognize that the existence of alternative modes of redress may displace the federal right to sue. Here, the *only* effective means of redress for the Petitioners would be a suit for damages under *Bivens*. No other remedy exists under domestic state or federal law,[13] and a foreign judgment against Agent Mesa would not be enforceable in U.S. courts, even if the courts of Mexico were to enter judgment against him.[14] The suggestion in the court below that a "judicially implied tort remedy under *Bivens* . . . is

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[12] For a more detailed discussion of the benefits of incorporating § 1983 standards into *Bivens* actions, see Pfander & Baltmanis, *supra* p. 14, at 141–50.

[13] The government implies in its Brief in Opposition that restitution owed to a victim's family accompanying a guilty murder verdict might be a sufficient remedial alternative. Br. at 12. But the refusal of the federal government to prosecute or extradite Agent Mesa moots any such claim.

[14] Although the *Wilkie* Court refused to recognize a *Bivens* action under the Fifth Amendment for retaliatory takings, numerous "special factors" were said to justify non-recognition. Here, there are no special factors that would justify overriding the right to sue. This is a familiar law enforcement context, with a well-developed body of law on which courts may draw from instructing juries and managing litigation. Courts are well versed in unreasonable seizures; as a result, this case presents few of the imponderables or practical challenges that led the Court to refrain from recognizing a right of action in *Wilkie*.

not and was not the plaintiffs' only source of review for this tragedy" finds no support in governing law, unless one stretches the concept of "review" to include internal review of Mesa's conduct within the Department of Justice. *Hernandez* v. *United States*, 785 F.3d 117, 133 (5th Cir. 2015) (en banc) (Jones, J., concurring) (per curiam).

A. No Available Alternative Remedy Under Domestic Law.

Petitioners could not prevail in a claim against the federal government under the FTCA. As discussed above, claims under the FTCA against the federal government are sometimes available as a congressionally approved supplement to the remedies available under *Bivens*. However, claims "arising in a foreign country" are explicitly barred under the FTCA. 28 U.S.C. 2680(k); see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004) ("[T]he FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."). The extraterritorial nature of the injury would preclude Petitioners from successfully recovering damages under the FTCA.[15]

State law likewise provides no opportunity for redress because the Westfall Act forecloses any law-

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[15] Petitioners did not retain an alternative remedy via review of the Attorney General's scope-of-employment certification. *Cf. Hernandez*, 785 F.3d at 132–33 (Jones, J., concurring) (citing *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995)). Absent any indication that Agent Mesa was acting outside the scope of his official duties, a state law claim can hardly be considered a viable alternative remedy under this Court's cases.

suits against federal officers based on state law.[16] If Petitioners were to file a Texas state law claim against Mesa, the Westfall Act would require the substitution of the federal government as defendant and transformation of the state law claim into an FTCA claim. As discussed above, the extraterritorial nature of Mesa's acts would require the court to dismiss the transformed claim under the FTCA. The same process would unfold if Petitioners were to bring a claim based on Mexican law in a U.S. state or federal court.

B. Any Foreign Judgment Against Mesa Would Not Be Enforceable In A U.S. Court.

Petitioners would be left without actual redress if they won a judgment against Agent Mesa in a foreign court and sought enforcement of that judgment in state or federal court. Although the federal government's refusal to extradite Mesa may bar Mexican courts from exercising jurisdiction over civil claims against him, it is conceivable that the direct and indirect effects of an officer's conduct could serve as sufficient basis for a foreign court to exercise jurisdic-

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[16] Although *amici* have debated the scope of the Westfall Act immunity, we agree that, if the Westfall Act is read to preclude state law remedies for constitutional violations, the Act contemplates that *Bivens* claims will be broadly available to remedy constitutional violations by federal officials. Compare Vázquez & Vladeck, *supra* p. 7, at 577–82, *with* James E. Pfander & David P. Baltmanis, *W(h)ither* Bivens? 161 U. Pa. L. Rev. Online 231, 236–42 (2013). This brief assumes that the Westfall Act precludes state remedies for constitutional violations by federal officials. *Cf. Minneci* v. *Pollard*, 132 S. Ct. 617, 624 (2012) ("Prisoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government." (citing Westfall Act, 28 U.S.C. §§ 2671, 2679(b)(1))).

tion.[17] Even so, no federal statute provides for the courts of the United States to recognize and enforce any hypothetical judgments that the Petitioners might secure in the courts of a foreign country. Any suit to enforce the foreign judgment would thus fall within the scope of Agent Mesa's Westfall Act immunity from suit. See 28 U.S.C. § 2679(b)(1) ("Any other civil action or proceeding for money damages [aside from that permitted against the federal government] arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred."). If such a suit were brought, and transformed into an action against the government under the FTCA, it would run afoul of the preclusion of liability for injuries that occur outside the United States. A foreign judgment that Petitioners cannot likely obtain in Mexico and cannot in any case enforce in the courts of the United States cannot provide an "alternative remedy" that displaces a *Bivens* right to sue.

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[17] For the purposes of our discussion, we assume Petitioners may have an actionable claim in a Mexican court. This assumption is not intended to refute the claims by Petitioners and other *amici* that no redress is available in Mexican courts.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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RECORD AND BRIEF

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JESUS C. HERNANDEZ, et al.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Restore the Fourth, Inc. ("Restore the Fourth") is a national, non-partisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes in technology, governance, and law should foster—not hinder—the protection of this right.

To advance these principles, Restore the Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore the Fourth also files *amicus curiae* briefs in significant Fourth Amendment cases.[2]

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[1] This *amicus curiae* brief is filed with the written consent of all parties in this case. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than Restore the Fourth, Inc. and its counsel, contribute money intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Plaintiff-Appellee Araceli Rodriguez, *Rodriguez v. Swartz*, No. 15-16410 (9th Cir. filed May 7, 2016); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Defendant-Appellant Stavros M. Ganias, *United States v. Ganias*, No. 12-240-cr (2d. Cir. filed July 29, 2015) (en banc).

SUMMARY OF THE ARGUMENT

The Constitution establishes a government of laws, not men. For this reason, Alexander Hamilton rejected the view that the Constitution, as originally drafted, needed to include a separate bill of rights: "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[3] Hamilton recognized that because the Constitution established the total scope of power that government officials could exercise, any addition of a bill of rights would only invite "men disposed to usurp, a plausible pretense for claiming . . . power" that the Constitution otherwise gave them no basis to claim.[4] As Hamilton ultimately concluded, "why declare that things shall not be done which there is no power to do?"[5]

This case bears out the prescience of Hamilton's concern. On a hot summer day in 2010, U.S. border patrol agent Jesus Mesa shot and killed 15-year-old Sergio Hernandez—a Mexican citizen—without provocation or warning while Sergio was playing with a group of boys in a culvert straddling the U.S.-Mexico border. Sergio's family then sought justice for Sergio's death in the United States, suing Agent Mesa (*inter alia*) in his individual capacity for damages. One of the tort claims that Sergio's family raised was that Agent Mesa's arbitrary use of lethal force violated the Fourth

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[3] THE FEDERALIST NO. 84 (Alexander Hamilton) (capitalized text in original).

[4] *Id.*

[5] *Id.*

Amendment's guarantee against unreasonable government seizures.

This claim spurred a fierce debate in the lower courts over how to interpret the Fourth Amendment. What troubled the lower courts was the fact that at the time Sergio was killed, he was a Mexican citizen standing on Mexican soil (while Agent Mesa was standing on U.S. soil). In *United States v. Verdugo-Urquidez*, a plurality of this Court held that a Mexican national who lacked significant voluntary ties to the United States could not invoke the Fourth Amendment to challenge a warrantless search of his private home in Mexico by U.S. law enforcement. 494 U.S. 259, 275 (1990). Based on *Verdugo-Urquidez*, the lower courts here found that Sergio's family likewise could not invoke the Fourth Amendment given Sergio's death in Mexico and his lack of significant voluntary ties to the United States.

This is Hamilton's nightmare come to life. In drafting the Fourth Amendment, the Framers sought to limit "all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 (1886). Yet, because the Framers put this right on paper as one retained by "the people," the Fourth Amendment has come to be viewed as a constructive grant to U.S. officials of unlimited powers to search and seize aliens outside the United States, since such aliens are not part of "the people." *See Verdugo-Urquidez*, 494 U.S. at 275. This case now represents the logical culmination of that view, with the lower courts finding

in effect that U.S. border patrol agents may arbitrarily kill aliens on foreign soil without incurring any risk of constitutional liability.

Restore the Fourth respectfully submits that such a state of affairs demands a return to first principles. Under those principles, the question that has to be answered here is not whether the Fourth Amendment protects a foreign alien killed by a U.S. border patrol agent on foreign soil. Rather, the question is whether the Constitution authorizes U.S. border patrol agents to use lethal force arbitrarily against *any* person—no matter the target's identity, nationality, or territorial location. And the answer to this question, as rooted in this Court's precedents since the Founding, is an unequivocal "no."

The only question that then remains is what the remedy should be when a U.S. official exceeds their constitutional authority and injures another person. "The very essence of civil liberty," after all, is "the right of every individual to claim the protection of the laws." *Marbury v. Madison*, 1 U.S. (Cranch) 137, 163 (1803) (Marshall, C.J.). On this score, this nation's early history reveals examples of U.S. officials being held liable as individuals for damages when they conducted illegal seizures targeting aliens beyond this country's borders. This tradition counsels against applying the *Verdugo-Urquidez* plurality opinion to this case.

ARGUMENT

I. The Constitution is enforceable against all U.S. officials who exceed their power.

A. All actions by U.S. officials must be authorized by the Constitution.

The "first official action" of America was to acknowledge the self-evident truths "that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 159–60 (1897). But the Declaration of Independence did more than just affirm the existence of unalienable rights. It also explained what was needed "to secure these rights": government by consent. For this reason, America has a written constitution.

During the Founding era, "written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments." *Hurtado v. People of California*, 110 U.S. 516, 531–32 (1884). The Framers thus drafted the Constitution to ensure that the powers that were delegated to the federal government were "few and defined."[6] *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("The Constitution created a Federal Government of limited powers."). As a result, it is no exaggeration to say that "the Constitution is the sun of the [American] political system, around which all

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[6] THE FEDERALIST NO. 45 (James Madison).

Legislative, Executive and Judicial bodies must revolve." *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 308 (1795).

Hence, the first question that must always be asked whenever government officials injure private individuals is this: does the Constitution authorize the government's conduct in the first place? The Court's decision in the *Steel Seizures Cases* embodies this point. At issue was a presidential order directing a massive government seizure of privately-owned steel mills in the heat of a nationwide labor strike. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952). The Court could have defined this case in terms of whether the seizure order violated the mill-owners' Fourth Amendment right against unreasonable seizures, or their Fifth Amendment right against unjustified takings. *See, e.g., id.* at 631 (Douglas, J., concurring). Instead, the Court focused on whether the Constitution gave the President the power to do what he did in the first place. *See id.* at 582 (majority opinion) (explaining that the Court was being asked to decide "whether the President was acting within his constitutional power").

Such analysis demonstrates that fidelity to the Constitution is about more than determining if the Constitution expressly forbids the government from doing something—e.g., abridging freedom of speech. Fidelity to the Constitution also requires observing that its enumeration of certain powers means that government "can exercise only the powers granted to it." *McCulloch v. Maryland*, 17 U.S. 159, 199 (1819). Put

another way, all government action must be authorized by the Constitution and further accord with "the general principles . . . common to our free institutions." *Fletcher v. Peck*, 10 U.S. 87, 139 (1810). And based on this rule, the Court has invalidated government conduct on many occasions—even when no express provision of the Constitution could be said to bar the challenged government conduct.

Consider, for example, *Terrett v. Taylor*, 13 U.S. 43 (1815). Virginia passed a law confiscating "all the property of the Episcopal churches in the respective parishes of the state." *Id.* at 48. Were such a law to be passed today, it would undoubtedly be found to violate the First Amendment's protection of religious liberty. But in 1815, the First Amendment was not understood to apply to the states. *See Permoli v. Municipality No. 1 of the City of New Orleans*, 44 U.S. 589, 609 (1845) ("The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties . . . ."). And yet, the Court still found Virginia's church-property-seizure law unenforceable. *See Terrett*, 13 U.S. at 55 (holding that Virginia's law did not divest private title of the lands at issue).

The Court reached this conclusion because neither "the fundamental laws of every free government" nor the "spirit and the letter of the [C]onstitution" gave Virginia the power to do what it did. *Id.* at 52. In the same vein, the Court rejected the argument that because of the Revolution, "all the public property acquired by the Episcopal churches . . . became the property of the state." *Id.* at 49. The Court noted that

before the Revolution, the church property at issue had been privately purchased and "[i]t was not in the power of the [C]rown to seize or assume it . . . unless by the exercise of a power the most arbitrary, oppressive and unjust." *Id.* at 49–50. And after the Revolution, Virginia "succeeded only to the rights of the crown," which meant that Virginia was not granted any new authority to do what it did. *Id.* at 50.

A similarly rigorous examination of government power may be seen in *Loan Association v. Topeka*, 87 U.S. 655 (1875). The Court confronted a Kansas state law that enabled towns and cities in Kansas "to take the property of the citizen under the guise of taxation . . . and use it in aid of the enterprises of others which are not of a public character." *Id.* at 659. Such a law today would likely invite close scrutiny under the Fourteenth Amendment's due process and equal protection guarantees. The Court, however, tackled the law in more basic terms: "unless the legislature of Kansas had the right to authorize the counties and towns in that State to levy taxes to be used in aid of [private] manufacturing enterprises . . . for purposes of gain, the law is void." *Id.* at 660. The Court then proceeded to "inquir[e] whether such a power exists in the legislature of the State of Kansas." *Id.*

The Court found no such power existed. *See id.* at 664. The Court drew this conclusion from "[t]he theory of our governments, State and National, [which] is opposed to the deposit of unlimited power anywhere." *Id.* at 663. The Court further recognized "the limitations on . . . power which grow out of the essential

nature of all free governments"—limits "without which the social compact could not exist, and which are respected by all governments entitled to the name." *Id.* And based on these limits, Kansas could not "lay with one hand the power of the government on the property of the citizen," and then, with the other hand, bestow that property "upon favored individuals to aid private enterprises and build up private fortunes." *Id.* at 664. This kind of government conduct was neither legislation nor taxation, but simple "robbery" perpetrated "under legislative forms." *Id.*

What cases like *Loan Association* and *Terrett* demonstrate is that the Constitution limits the exercise of *all* government power, even when the Constitution may not expressly identify the relevant limit (e.g., a bar on government taxation for private gain). This accords with the "predominant political impulse" of the Framers, which was a "distrust of power" and "insist[ance] on constitutional limitations against its abuse." *Weems v. United States*, 217 U.S. 349, 372 (1910). The Framers recognized that such limits were essential to advance the Constitution's "great and paramount purpose": to unite our nation's "wealth and power" for "the protection of the humblest individual." *Gibbons v. Ogden*, 22 U.S. 1, 223 (1824) (Johnson, J., concurring). As such, the Constitution stands against any state of affairs that would cede to U.S. officials "a power of destroying at pleasure without the direction of laws."[7]

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[7] 1 WILLIAM BLACKSTONE, COMMENTARIES *133.

B. The Constitution does not authorize the arbitrary use of lethal force.

In establishing a government of limited powers, the Constitution leaves no room for the exercise of arbitrary power. In *Yick Wo v. Hopkins*, the Court made this clear in confronting a city's arbitrary use of government licensing power to harass Chinese-owned laundries. 118 U.S. 356, 373–74 (1886). The Court noted that "the very idea that one man may be compelled to hold his life . . . or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails." *Id.* at 370.

Of course, the rejection of arbitrary power under the Constitution is most often associated with the due process guarantees of the Fifth and Fourteenth Amendments. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citation omitted). And this makes sense insofar as the lineage of due process may be traced back to Magna Carta and the many volumes of law that have been dedicated to this term—all of which have led "the good sense of mankind" to conclude that the Constitution's due process guarantees are meant "to secure the individual from the arbitrary exercise of the powers of government." *Bank of Columbia v. Okley*, 17 U.S. 122, 127 (1819).

But there is also good reason to believe that the Constitution does not permit the exercise of arbitrary

power regardless of its due process guarantees. In *Yick Wo*, the Court nodded to this reality: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." 118 U.S. at 370.

This observation matters today given how mired modern constitutional law has become in trying to figure out which Bill of Rights provision should be said to govern a given instance of arbitrary power. *Compare, e.g.*, *Graham v. Connor*, 490 U.S. 386, 388–89, 395 (1989) (majority opinion) (indicating that an excessive force claim is "properly analyzed" under the Fourth Amendment rather than "under a substantive due process standard"), *with, id.* at 399–400 (Blackmun, J., concurring in part) (refusing to "foreclos[e] the use of substantive due process analysis"). The present case is no exception, with the Fifth Circuit getting mired in a heated debate over whether the Fifth Amendment versus the Fourth Amendment protected Sergio Hernandez from being arbitrarily killed by a U.S. border patrol agent. *See Hernandez v. United States*, 785 F.3d 117, 133–34 (5th Cir. 2015) (Prado, J., concurring).

In earlier eras, however, this Court took a much simpler approach: the Constitution did not allow for arbitrary power because "[a]rbitrary power . . . is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude." *Hurtado*, 110

U.S. at 536. Law, by contrast, is "the definition and limitation of power." *Yick Wo*, 118 U.S. at 370. To speak of a government of limited powers, then, is to speak of "a government of laws, and not of men." *Id.* And under a government of laws, courts are "constrained to pronounce . . . inoperative and void" any government action that "clothes" a person with power but then "lays down no rules" to ensure the "impartial execution" of this power or to prevent "partiality and oppression." *Id.* at 373.

In no arena does this principle matter more than when it comes to the use of lethal force. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). And since arbitrary power is not law, nothing in the Constitution—which establishes a government of law—can be said to authorize, or even tolerate, the arbitrary use of lethal force.

By the same token, "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). The Framers recognized this all too well by virtue of "[t]he struggles against arbitrary power in which they had been engaged for more than twenty years." *Boyd v. United States*, 116 U.S. 616, 630 (1886). This bitter experience taught the Framers that "[t]he

accumulation of all powers . . . in the same hands . . . [was] the very definition of tyranny."[8] The arbitrary use of lethal force also fits this definition, reflecting an accumulation of the powers of "prosecutor, jury, judge, and executioner" in the hands of a single government official. *Screws v. United States*, 325 U.S. 91, 106 (1945) (plurality op.). Thus, under the Constitution—under "a government of law, not a government of men"—no government official may wield such power, or escape legal liability for doing so. *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 399 (1894).

C. No U.S. official is above the law.

The Constitution is the "supreme Law of the Land" and all government power must be exercised in accordance with this rule. U.S. Const., art. VI. Every government official in America is thus charged with the duty of exercising only those powers granted to them by the Constitution or in accordance with the Constitution. *See Marbury*, 1 U.S. at 179. Holding government officials to that duty, in turn, is the very essence of *the rule of law*—a concept that "has been understood since Greek and Roman times to mean that a ruler must be subject to the law in exercising his power and may not govern by [mere] will alone." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring).

Hence, under the Constitution, no government official is above the law. This is true of presidents. *See,*

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[8] THE FEDERALIST No. 47 (James Madison).

e.g., *United States v. Nixon*, 418 U.S. 683, 715 (1974) (rejecting the notion that "a President is above the law"). It is also true of ordinary administrative officials, like Postal Service employees. *See, e.g.*, *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) ("That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but . . . . [t]he acts of all its officers must be justified by some law . . . ."). The only remaining question is how to enforce this rule of law against U.S. officials who exceed the limited power given to them by the "Constitution, and the laws of the United States which shall be made in pursuance thereof." U.S. Const., art. VI.

The Court, however, settled this question over two centuries ago in observing that "[i]f one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued." *Marbury*, 1 U.S. at 170. Indeed, the enforcement of "the limitations imposed by our constitutional law . . . . by judicial process is the device of self-governing communities to protect . . . against the violence of public agents transcending the limits of lawful authority." *Hurtado*, 110 U.S. at 536.

This has led the Court to reject various legal contrivances meant to defeat this principle. For example, the Court has noted that when "officers charged with the administration of [a] valid tax law . . . . go beyond the powers thereby conferred, . . . the fact that the[se]

[officers] are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts." *Reagan*, 154 U.S. at 390–91. Rather, it still remains the case that when an "official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Am. Sch. of Magnetic Healing*, 187 U.S. at 108.

And that is how the Constitution is supposed to work. "The Legislature and Executive may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law. But the Judiciary, insulated from both internal and external sources of bias, is duty-bound to exercise independent judgment in applying the law." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1219 (2015) (Thomas, J., concurring). The exercise of such judgment, in turn, checks the expansion of arbitrary power otherwise made possible by its selective application. *See Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.").

Now consider what this means in the context of government searches and seizures—including the use of lethal force. "[W]e must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the [most] fit and

responsible." *Brinegar*, 338 U.S. at 182 (Jackson, J., dissenting). We must also remember that "[i]n a government of laws, [the] existence of the government will be imperiled" unless government officials who exceed their power are held to account—especially those who kill without reason. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). In this regard, private suits against government officials in their individual capacity have been an integral part of this nation's dedication to ensuring that no government official ever becomes "a law unto himself." *Id.*

II. In the Founding Era, government officials could *always* be held individually liable for illegal seizures, regardless of the seizure's location or the victim's nationality.

When Alexis de Tocqueville first visited America in the 1830s, one aspect of the young nation that quickly drew his attention was "[t]he right granted to the courts of justice of judging the agents of the executive government, when they have violated the laws."[9] He was surprised to find that this right was "so natural a one that it cannot be looked upon as an extraordinary privilege."[10] He was also surprised to find that this right, far from weakening "the springs of government," had actually "increased . . . that respect which is due

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[9] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 107 (H. Reeve trans., 7th ed., 1847).

[10] *Id.*

to the authorities, and at the same time . . . rendered those who are in power more scrupulous of offending public opinion."[11]

These observations speak to a broader historical point: that for much of this nation's history, private tort suits against U.S. officials as individuals were the principal means of enforcing constitutional limits on government power, including the Constitution's general disallowance of arbitrary force. A case like *Jones v. Seward* puts this in perspective. 26 How. Pr. 34 (N.Y. Sup. Ct. Oct. 19, 1863). A U.S. diplomat sued U.S. Secretary of State William Seward for damages arising from false imprisonment. *See id.* at 34. The minister contended that Seward had illegally ordered the diplomat's arrest and jailing "under authority . . . from the President." *Id.* Seward subsequently asked the state trial court to transfer the action to federal court because he intended to defend himself by arguing that his alleged conduct was authorized under the Constitution. *Id.* at 35.

The state trial court rejected Seward's motion. *See id.* at 44. The court explained that it could find no "appearance or color of substance" in Seward's proposed defense: that the Constitution "has invested its chief executive officer with power to arrest or imprison, or to authorize another to arrest or imprison, any person not subject to military law, at any time" without judicial process. *Id.* at 35–36. Nothing in the Constitution could "be tortured into the conferring of such a power on the

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[11] *Id.*

President in his civil capacity." *Id.* at 36. Indeed, it would be "the grossest contradiction and strangest anomaly to say that absolute and unlimited power . . . can be implied from a [C]onstitution which avowedly gives no power to any department of the government that is not specifically set forth." *Id.* The court thus found that "[t]he only questions in this action worthy of consideration, and which can be entertained, do not arise under the [C]onstitution . . . but are fitly within the jurisdiction of this court." *Id.* at 44.

Such analysis reflects an original understanding of how abuses of government power were meant to be processed vis-à-vis the Constitution: in short, above all else, U.S. officials could **always** be held liable in their individual capacity for exceeding their proper authority or engaging in unlawful acts. After all, "[w]hen these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf." *Olmstead*, 277 U.S. at 483 (Brandeis, J., dissenting).

But what if a U.S. official's unlawful acts are targeted at a foreigner rather than a citizen? Did the Framers believe that foreigners had less of a right to sue U.S. officials for tort damages than American citizens? Neither the history of the Constitution nor this Court's jurisprudence supports such a view. Rather, in arguing for a robust federal judiciary, Alexander Hamilton noted that "[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought

ever to be accompanied with the faculty of preventing it."[12] This led Hamilton to conclude that because "the denial or perversion of justice by the sentences of courts . . . is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned."[13]

After the Constitution was ratified, American leaders repeatedly affirmed the full measure of justice available to foreigners in U.S. courts. For example, in addressing Danish concerns about the U.S. navy's seizure of three Danish vessels abroad, Secretary of State James Madison explained that "general usage requires that redress should be first prosecuted judicially" and then touted "the scrupulous regard to the rights of foreigners by which [American] courts of justice are distinguished."[14] U.S. Attorney General Richard Rush later reinforced this view in a formal opinion on the "judicial privileges of foreigners."[15] He declared that the "courts of the United States in every State are at all times open to the subjects of a foreign power in friendly relations with them" and that such foreign subjects were "entitled to claim the benefit of every legal remedy in

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[12] THE FEDERALIST NO. 80 (Alexander Hamilton).

[13] *Id.*

[14] Letter from Secretary of State James Madison to Richard Soderstrom dated July 23, 1801, 3 AM. STATE PAPERS: FOREIGN RELATIONS 345 (Washington, D.C., Gales & Seaton 1832), *available online*, http://bit.ly.2haVZGQ.

[15] 1 Op. Att'y Gen. 192, 193 (1816).

as ample a manner as could be enforced by any citizen of the United States."[16]

Finally, there is this Court's decision in *The Sapphire*, in which the Court spoke directly to whether the French emperor could sue in federal court. 78 U.S. 164, 167 (1870). The Court replied: "On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling." *Id.*

Such a denial also would not be in keeping with "the great and leading principles of a free and equal national government," one of which is "to ensure justice to all." *Chisholm v. Georgia*, 2 U.S. 419, 477 (1793) (Jay, C.J.). To this end, "what is it to justice, how many, or how few; how high, or how low; how rich, or how poor; the contending parties may chance to be? Justice is indiscriminately due to all, without regard to numbers, wealth, or rank." *Georgia v. Brailsford*, 3 U.S. 1, 4–5 (1794) (Jay, C.J.). The same may be said about a person's citizenship, which helps to explain why the early legal history of our nation presents examples of foreigners holding U.S. officials individually liable for illegal seizures—even when the seizure took place outside the territory of the United States.

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[16] *Id.*

A. The early history of federal claims law indicates that U.S. officials could always be held individually liable for any illegal seizure they committed.

Gauging how the Framers would have viewed a foreigner's tort suit against a U.S. official for injuries caused by an illegal seizure beyond the country's borders is no easy task. History limits this inquiry to the extent that at the time of the Founding and in the decades that followed, there was no border patrol or federal law enforcement agency like the FBI empowered to engage in seizures either inside or outside the United States. To the contrary, as de Tocqueville observed during his 1830s visit, the means then available to the authorities "for the discovery of crimes and the arrest[] of criminals [were] few. A state police d[id] not exist and passports [were] unknown."[17]

Nevertheless, there are two sources of law from the Founding Era that provide insight on how the Framers understood the right of foreigners to challenge injurious extraterritorial conduct by U.S. officials. One of those sources is federal claims law, which is reflected in a series of reports created by the U.S. Committee on Claims, "one of the oldest standing committees in the United States House of Representatives."[18] The Committee was established on November 13, 1794, and its duty was to "take into consideration

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[17] ALEXIS DE TOCQUEVILLE, *supra* note 9, at 98.

[18] *Guide to House Records: Chapter 6: Claims 1794–1946*, U.S. NAT'L ARCHIVES, https://www.archives.gov/legislative/guide/house/chapter-06-claims.html (last visited Dec. 7, 2016).

all petitions and matters or things touching claims and demands on the United States . . . and to report their opinion thereon."[19]

In this capacity, the Committee often considered claims by U.S. officials seeking indemnification for tort judgments entered against them as individuals. The Committee's responses to these claims, in turn, reveal several instances of U.S. officials or agents being held liable for illegal seizures even when a foreigner was the victim and/or the seizure happened to occur outside the United States.

One notable example of this may be seen in Claim Report No. 350, "Indemnity to a Teamster for Damages Awarded Against Him" (Feb. 7, 1817).[20] The claim was pressed by a New York merchant who was hired as a teamster by a U.S. army officer in 1814, during the midst of the War of 1812 between the United States and Britain. The teamster rode with the colonel on his march from the United States into Lower Canada—a British province. Once in Lower Canada, the officer ordered the teamster to seize a puncheon of rum from a British subject's private home and then carry it across the U.S.-Canada border to a guard-house in Vermont. After following these orders, the teamster was sued by

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[19] *Id.*

[20] *See* 1 AM. STATE PAPERS: CLAIMS 523 (Washington D.C., Gales & Seaton 1834), *available online*, http://bit.ly/2gIvDvn.

the British subject for conversion and was ultimately required to pay damages to the subject.[21]

The teamster asked the Claims Committee for indemnification, but the Committee refused (though Congress later agreed to pay). The Committee based this decision on the fact that the "United States have in no instance, while at war, justified the seizure or capture of private property belonging to a citizen or subject of the enemy." Thus, presuming the rum was the private property of a British citizen, the army officer's arbitrary seizure of it "was an offense in the officer, and a violation of private right, for which the individual injured would be entitled to damages." The Claims Committee did not appear to care that the seizure took place in Lower Canada during a time of war.

Now consider Claim Report No. 387, "Indemnity to Major Gen. Brown Against Certain Judicial Proceedings" (Feb. 9, 1818).[22] Jacob Brown, a major general in the U.S. Army, sought indemnity for a judgment entered against him by a New York state court. The judgment arose from Brown's arrest of a man named Henry Utley while Brown's forces were located on the

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[21] The Claims Committee's report states that the teamster was "arrested at the suit" of the British subject in "Missique bay." This appears to be a reference to a location in Vermont, indicating that the British subject sued in an American court. *See* R.A. DOUGLAS-LITHGOW, DICTIONARY OF AMERICAN-INDIAN PLACE & PROPER NAMES IN NEW ENGLAND 91 (1909) (identifying "Missique Bay" as the name of a place in Vermont).

[22] *See* 1 AM. STATE PAPERS: CLAIMS, *supra* note 20, at 551, *available online*, http://bit.ly.2h4npjT.

Canadian frontier. Brown had Utley arrested on suspicion of spying for the British; it is unclear what Utley's citizenship was at the time. Utley subsequently sued Brown in New York state court for assault, battery, and false imprisonment and was awarded damages. The Claims Committee found that Brown "acted only as a prudent officer would have done in the arrest of Utley" and agreed that Brown should be indemnified. The Committee's analysis did not turn on where the arrest took place or whether the arrestee was an American.

What these examples reveal is that the Claims Committee was singularly focused on arbitrariness in deciding whether U.S. officials were entitled to indemnification on court judgments arising from government seizures. In short, if a U.S. official had acted arbitrarily (i.e., without authority) then he alone was liable for his conduct; the United States would not indemnify him. But if a U.S. official had acted prudently, then indemnification was possible. In this calculus, an injured party's nationality or the location of the seizure was irrelevant—a point the Claims Committee articulated at length in Claim Report No. 560, "Goods in Canada, Belonging to a Merchant in New York, Captured by the Troops of the United States" (Dec. 21, 1821):[23]

> If . . . it was lawful for [a U.S. official] to take the enemy's property in the country of the enemy, the committee think it would be equally so for him to take the property of our own citizens found in the country of the enemy . . . .

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[23] 1 AM STATE PAPERS: CLAIMS, *supra* note 20, at 793, *available online*, http://bit.ly/2hcm&rP.

> On the other hand, if it was not lawful to take . . . the property either of the enemy or our own citizens, the committee think the taking . . . [is] an act performed on [the official's] own personal responsibility, for which he alone . . . is liable. . . .

This comprehensive understanding of U.S. officer liability fits with this Court's observation that "where an individual is sued in tort . . . to which his defense is that he has acted under the orders of the government," this defense requires the individual to "show that his authority was sufficient in law to protect him." *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 452 (1883). The Court did not further declare that this show-of-authority would be unnecessary if the tort crossed a border or the injured party was not a citizen.

B. The early history of federal maritime law indicates that U.S. officials could always be held individually liable for any illegal seizure they committed.

The early history of federal maritime law also provides useful insight on how the Framers would have reacted to a foreigner's tort suit against a U.S. official for injuries caused by an illegal seizure beyond U.S. territory. In particular, there are two key principles that can be discerned from this history that are helpful here: (1) that while the high seas are a jurisdictional no-man's-land, every vessel on the high seas is still answerable to its home nation; (2) that in exercising

power on the high seas, a U.S. vessel's captain owes a duty of reasonableness to every other vessel.

The Court's 1807 decision in *Hudson v. Guestier* speaks to the first principle: ongoing national control over vessels, even when situated on the high seas. 8 U.S. 293 (1807) (Marshall, J.). This principle was explained in the context of addressing whether any court in the world could take a vessel captured on the high seas away from its captor, or whether only the courts of the captor's nation had jurisdiction to do this. *See id.* at 293–94. The Court determined that the latter was true: a vessel "lawfully acquired under the authority of a sovereign state could not be divested by the tribunals of [another] country into whose ports the captured vessel was brought." *Id.* at 297.

In supporting this decision, the Court conceded that "cruisers are often commanded by men who do not feel a due respect for the laws, and who are not of sufficient responsibility to compensate the injuries their improper conduct may occasion." *Id.* at 296. The Court then emphasized that such cruisers "must [still] be considered as officers commissioned by their sovereign to make a seizure in the particular case, and to be ready to obey the legitimate mandate of the sovereign directing a restitution." *Id.* In short, a vessel on the high seas could properly be regarded as an extension "of the territory" of its home nation, *The Hamilton*, 207 U.S. 398, 403 (1907), thus preserving the home nation's authority to "govern the conduct of its citizens on the high seas." *Skiriotes v. Florida*, 313 U.S. 69, 79 (1941).

The second helpful principle revealed by the early history of American maritime law is that U.S. vessel commanders owe a duty of reasonableness in dealing with the vessels of other nations on the high seas. This may be seen in *The Marianna Flora*, 24 U.S. 1, 41–47 (1826) (Story, J.). While patrolling the high seas, an American cruiser encountered a Portuguese ship and drew close to ascertain whether the ship was in distress. *See id.* Fearing the American cruiser to be a pirate, the Portuguese ship opened fire, prompting the American cruiser to return fire. *See id.* The American cruiser eventually captured the Portuguese ship and attempted to forfeit her in a U.S. court. *See id.* The court rejected the forfeiture and ordered the commander of the American cruiser, Lieutenant Stockton, to pay damages. *See id.* On appeal, the circuit court reversed the award, leading the owners of the Portuguese ship to appeal to this Court to reinstate the damages award. *See id.*

This Court proceeded to consider "what are the rights and duties of armed [ships], and other ships, navigating the ocean in time of peace." *Id.* at 42. The Court found that upon the ocean in peacetime, "all possess an entire equality. It is the common highway of all." *Id.* The Court also found that ships like the American cruiser, being authorized "to arrest pirates, and other public offenders," were likewise entitled to approach other vessels at sea "for the purpose of ascertaining their real characters." *Id.* at 43.

This left only the question of how Lieutenant Stockton should have responded to the mistaken salvo

fired by the Portuguese ship. On this score, the Court found "[t]he real duty imposed upon Lieutenant Stockton was . . . **to exercise an honest and fair discretion on the subject**, and to obtain such explanations as might guide his judgment." *Id.* at 51 (bold added). And that defeated any claim for damages against him, since it was "conceded on all sides . . . that he acted with honorable motives." *Id.* at 52. By contrast, "[i]f Lieutenant Stockton had acted with gross negligence or malignity, and with a wanton abuse of power, there might be strong grounds on which to rest this claim of damages." *Id.*

The Court thus affirmed the principle that *reason* and *respect* for the inherent rights of others are the critical lodestars for determining the individual liability of U.S. officials. That principle can also be seen in a later maritime decision by this Court indicating that an American vessel that violates American laws on the high seas to the injury of another vessel is liable no matter what the nationality of the other vessel happens to be. Specifically, in *The Scotia*, the Court affirmed the liability of an American ship for colliding with a British ship on the high seas—a collision caused by the American ship's failure to display the correct lights required under American navigation laws. 81 U.S. 170, 183–89 (1871).

The Court noted that American navigation laws "were intended to secure the safety of life and property, as well as the convenience of commerce." *Id.* at 185. With this in mind, the Court reasoned that even if these laws could not be said to govern "the ships and

people of other nations," these laws were "at least designed for the security of the lives and property of our own people." *Id.* In that regard, they operated as rules of reason—ones that were "as useful and as necessary on the ocean as they are upon inland waters." *Id.* This prompted the Court to ask: "How, then, can our courts ignore [these laws] in any case? Why should it ever be held that what is a wrong when done to an American citizen, is right if the injured party be an Englishman?" *Id.*

The present case beckons the same question: why should it ever be held that a U.S. official's arbitrary use of lethal force is an actionable constitutional violation when done to an American citizen, but is not actionable, and thereby excused, when done to a Mexican national standing on Mexican soil? The relevant abuse is not rendered less arbitrary by where it transpired or the nationality of the person injured by it. And the early history of federal claims law and federal maritime law stand for the opposite view: that individual liability attaches to U.S. officials for all illegal seizures, no matter the location of the seizure or the nationality of the victim. The Court should take that history into account in considering the facts of this case—facts that do not bear any meaningful resemblance to those considered by this Court in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

III. The plurality opinion in *Verdugo-Urquidez* should not be followed in *Hernandez*.

In *Verdugo-Urquidez*, a plurality of this Court held that the Fourth Amendment did not apply to the warrantless search of an individual's home by U.S. officials where the individual "was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico." *Id.* at 274–75 (plurality op.). Based on this holding, the Fifth Circuit here found that the Fourth Amendment could not be invoked to hold a U.S. border patrol agent liable for arbitrarily killing a 15-year-old Mexican teenager on Mexican soil. *See Hernandez*, 785 F.3d at 119 (en banc).

The *Verdugo-Urquidez* plurality opinion, however, has no proper application in this case. The Fourth Amendment claim at issue here is not about a criminal defendant attempting to suppress evidence in the face of a drug-trafficking prosecution. Rather, the Fourth Amendment claim at issue here implicates the very heart of "our institutions of government" and the remedy that these institutions have always provided to address "the play and action of purely personal and arbitrary power": a claim for damages against the offending U.S. official in his individual capacity. *Yick Wo*, 118 U.S. at 370.

With this in mind, the Court now has before it another path to affirm that the Hernandez family may hold the U.S. official who arbitrarily killed their son liable for this conduct—a path that does not turn on

extraterritorial application of the Bill of Rights or parsing the connectedness of foreigners with the United States. This path instead focuses on whether the Constitution authorized the U.S. border patrol agent in this case to do what he did: arbitrarily use lethal force against an unarmed, defenseless teenage boy. No such authority exists. The Hernandez family is therefore entitled to hold the agent individually liable for tort damages—a proposition that is supported by the early history of federal claims law and federal maritime law.

CONCLUSION

The Constitution "was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues." *Hurtado v. People of California*, 110 U.S. 516, 530–31 (1884). In that spirit, the Hernandez family has come to this nation's courts seeking to hold a U.S. official accountable for his arbitrary use of lethal force—a power not given to him by the Constitution. "In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." *Butz v. Economu*, 438 U.S. 478, 506 (1978). That is especially true for the constitutional guarantee at stake here: that "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882).

The rule must be discharged.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE PROFESSOR GREGORY C. SISK IN SUPPORT OF NEITHER PARTY

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BRIEF OF AMICUS CURIAE PROFESSOR GREGORY C. SISK IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Professor Gregory C. Sisk holds the Laghi Distinguished Chair in Law at the University of St. Thomas (Minnesota). His only interest in this matter is that of a legal scholar studying the jurisprudence of federal sovereign immunity and statutory waivers.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel made a monetary contribution to this brief's preparation or submission. Letters consenting to the filing of this brief are on file with the Clerk.

For more than a quarter of a century, Professor Sisk's scholarly work has focused on civil litigation with the federal government. He has published both a treatise and the only law school casebook on the subject. *Litigation With The Federal Government* (2016); *Litigation With The Federal Government: Cases and Materials* (2d ed. 2008 & 2015 Supp.). The treatise and the casebook each include a chapter devoted primarily to the Federal Tort Claims Act and a chapter on claims against federal officers including discussion of the Westfall Act and *Bivens*. Professor Sisk also has written several law review articles on federal sovereign immunity and the construction of statutory waivers of federal sovereign immunity.

Professor Sisk's scholarly publications on federal government litigation are cited regularly by the federal courts. *See, e.g.*, *United States* v. *Tohono O'odham Nation*, 563 U.S. 307, 314 (2011); *Barnes* v. *United States*, 776 F.3d 1134, 1144 (10th Cir. 2015); *Collins* v. *United States*, 564 F.3d 833, 836 (7th Cir. 2009); *Suburban Mortg. Assocs., Inc.* v. *HUD*, 480 F.3d 1116, 1123 n.12 (Fed. Cir. 2007); *Role Models Am., Inc.* v. *Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004).

In addition to Professor Sisk's teaching and scholarly work, he continues to practice law, primarily on a pro bono basis. As a former appellate attorney with the Civil Division of the U.S. Department of Justice and now as a private attorney, Professor Sisk has litigated cases on behalf of both the Government and private parties under statutory waivers of federal sovereign immunity.

INTRODUCTION AND SUMMARY OF ARGUMENT

In addition to questions concerning the scope of Fourth Amendment protection and the nature of qualified immunity, this Court has asked the parties "[w]hether the claim in this case may be asserted under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)." Amicus writes to emphasize one important threshold consideration in resolving the *Bivens* question: the unavailability of an "'alternative, existing process for protecting the constitutionally recognized interest'" asserted by petitioners here. *Minneci* v. *Pollard*, 132 S. Ct. 617, 621 (2012) (quoting *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007)) (brackets omitted).

This Court considers the availability of alternative remedy schemes as a threshold matter when evaluating whether an implied remedy under *Bivens* is available for the redress of constitutional wrongs. *Minneci*, 132 S. Ct. at 621. But in cases like this one, plaintiffs ordinarily cannot obtain a remedy under either the Federal Tort Claims Act or state tort law. Because neither FTCA nor state tort remedies are available, these remedy schemes cannot weigh against the availability of a *Bivens* claim here. Rather, *Bivens* is the only possible source of an adequate damages remedy for the extreme harm—the wrongful taking of a human life—at issue in this case.

FTCA claims are barred in several ways in cases like this one:

Most obviously, the FTCA excludes "[a]ny claim arising in a foreign country," 28 U.S.C. § 2680(k), which this Court has interpreted to apply to "all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred," *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004). Given that

the fatal injury here was suffered across the border, the foreign country exception precludes FTCA liability even though the wrongful act occurred inside the United States.

Moreover, while not implicated in this case, the assault and battery exception ordinarily would bar an FTCA claim based on an intentional battery by a non-law-enforcement federal employee. 28 U.S.C. § 2680(h). This bar cannot be avoided by reframing a battery-based FTCA claim as one for negligent hiring, training, or supervision. *See Sheridan* v. *United States*, 487 U.S. 392, 406-408 (1988) (Kennedy, J., concurring in the judgment); *id.* at 410-411 (O'Connor, J., dissenting); *see also, e.g.*, *Billingsley* v. *United States*, 251 F.3d 696, 698 (8th Cir. 2001) (per curiam); *CNA* v. *United States*, 535 F.3d 132, 148-150 (3d Cir. 2008).

The FTCA thus provides no viable alternative to a *Bivens* remedy in cases like this, involving an alleged unjustified government killing.

State common-law tort remedies are also unavailable against an individual federal officer in most cases like this one. Under the Westfall Act, 28 U.S.C. § 2679(b)(1), the FTCA is the exclusive remedy for personal injury claims arising from a "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." And an individual federal employee retains immunity from state tort-law liability under the Westfall Act even if the United States is also immune under an FTCA exception (for example, the foreign country exception that applies in this case, or the assault and battery exception that applies to many intentional torts). *See Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995).

In the Westfall Act context, the recent broadening of state law *respondeat superior* principles, which was intended to *expand* employer accountability for intentional wrongdoing by employees, thus has the paradoxical effect of immunizing from suit both federal employees and the federal government itself. *See* Sisk, *Litigation With The Federal Government* § 5.6(c)(4) (2016).

This case exemplifies the limited reach of state tort law considering the Westfall Act: Here, the government certified that Mesa was acting within the scope of employment as a United State Border Patrol agent when he shot the Hernándezes' teenage son, making Mesa immune from personal injury claims under state law. State-law personal injury suits thus also provide no viable alternative to a *Bivens* remedy in cases like this.

ARGUMENT

I. WHETHER A *BIVENS* REMEDY IS AVAILABLE MAY DEPEND ON THE EXISTENCE OF WELL-DEVELOPED, ADEQUATE ALTERNATIVES

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 395-397 (1971), this Court held that a damages action will lie against federal agents, acting under color of federal authority, for their alleged violation of a plaintiff's constitutional rights. This Court grounded such claims in the basic proposition that there must be legal remedies for legal wrongs. *See id.* *Bivens* claims have been analogized to a federal version of claims under 42 U.S.C. § 1983, which authorizes suit against state officials acting under color of law. *See, e.g.*, Pfander & Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 121-126, 137

(2009); Zaring, *Three Models of Constitutional Torts*, 2 J. Tort L. No. 3, at 4 (2008).[2]

Bivens is not without limitation. In *Bivens*, the Court reasoned that an implied claim for damages for violation of the plaintiff's Fourth Amendment rights could proceed in part because such a claim "involve[d] no special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. For example, there was "no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the [government employee], but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.* at 397.

In subsequent cases defining the limits of the *Bivens* remedy, the Court has thus considered whether the existence of alternate remedies weighs against the expansion of *Bivens* claims into new contexts. *See* Sisk, *Litigation With The Federal Government* § 5.7(c) (2016) (hereinafter, "Sisk, *Litigation*"). This Court has described a "two step[]" analysis: First, courts expressly consider "'whether any alternative, existing process for protecting the constitutionally recognized interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages'"; and second, they consider whether there are "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Minneci* v. *Pollard*, 132 S. Ct. 617, 621 (2012) (quoting

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[2] Notably, Congress recognized the existence of *Bivens* remedies for violations of constitutional rights by federal actors when it passed the Westfall Act. 28 U.S.C. § 2679(b)(2)(A); *cf. Hui* v. *Castaneda*, 559 U.S. 799, 806-807 (2010) (noting Westfall Act's carveout of *Bivens* claims).

Wilkie v. *Robbins*, 551 U.S. 537, 550 (2007) (brackets and other internal quotation marks omitted)). Under this framework, the Court has limited the availability of *Bivens* remedies where there are well-developed, alternative remedy schemes, particularly in the administrative context.[3]

Minneci is illustrative. In that case, the Court declined to recognize a *Bivens* remedy for a federal prisoner who alleged inadequate medical care by privately employed prison staff in violation of the Eighth Amendment. The Court held that a *Bivens* remedy was unavailable because the plaintiff had a damages remedy for his alleged unconstitutional treatment under "roughly similar" state tort law. *Minneci*, 132 S. Ct. at 625. "Because ... state tort law authorizes adequate alternative damages actions," the Court would not imply a separate cause of action under *Bivens*. *Id.* at 620. What was "critical" in *Minneci* was that the defendant was a private employee, rather than a federal employee who would have been immune from suit in a state-law tort action. *Id.* at 623.

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[3] *See Wilkie*, 551 U.S. at 551-562 (claims under the Takings Clause of the Fifth Amendment could not support a *Bivens* remedy where there were other administrative and judicial remedies, including at the state level); *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988) (refusing to extend *Bivens* where comprehensive administrative process existed for social security beneficiaries); *Bush* v. *Lucas*, 462 U.S. 367, 375-380 (1983) (refusing to extend *Bivens* where comprehensive administrative process existed for aggrieved federal employees to contest management decisions). By contrast, here there is no congressionally created administrative remedy for cross-border shootings or similar acts of violence that might substitute for damages obtained in litigation.

Under the *Minneci* analysis,[4] there remain cases like this one, where plaintiffs have no alternative damages remedies that might weigh against the availability of a *Bivens* claim. Amicus submits that the unavailability of both FTCA claims and state common-law tort claims against an individual officer here means that these unavailable remedies cannot be considered as adequate alternatives or "special factors" that might counsel against the availability of a *Bivens* remedy. Indeed, this is the exact type of case where *Bivens* offers the only workable damages remedy for allegedly grievous violations of constitutional rights.

II. FTCA Remedies Are Unavailable In Cases Like This One

The claim in this case—that Mesa unjustifiably shot a teenage boy to death—is barred by the FTCA's foreign country exemption. 28 U.S.C. § 2680(k). Moreover, many similar claims that do not involve the foreign country exception will be barred by the FTCA's exception for certain intentional torts.

The FTCA, 28 U.S.C. § 1346(b), §§ 2671-2680, constitutes a "'sweeping'" waiver of the Federal Government's sovereign immunity. *E.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 492 (2006). The FTCA was designed "to ren-

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[4] *Minneci* may represent a narrower view of *Bivens*, under which the existence of an adequate alternative remedy scheme in itself may bar the availability of a *Bivens* claim. *See, e.g.* Reinert & Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 Wash. U. L. Rev. 1473, 1477 (2013) (arguing that, before *Minneci*, the Court had considered the existence of state-law remedies as part of a holistic inquiry, rather than a categorical reason to decline to recognize a *Bivens* action); *see also Minneci*, 132 S. Ct. at 627 (Ginsburg, J., dissenting); *Carlson* v. *Green*, 446 U.S. 14, 23 (1980) (availability of alternative remedy not dispositive).

der the Government liable in tort as a private individual would be under like circumstances." *Richards* v. *United States*, 369 U.S. 1, 6 (1962); *see also* 28 U.S.C. § 2674.

However, the government explicitly retained its immunity from suit for certain types of tort claims and for certain governmental activities, by including express statutory exceptions in the FTCA itself. 28 U.S.C. § 2680; *see also, e.g.*, *Richards*, 369 U.S. at 6. In a manner akin to an affirmative defense, such exceptions foreclose a tort remedy against the United States even when the individual tortfeasor was acting within the scope of federal employment and the pleadings otherwise state a cognizable tort claim under state law. *See* Sisk, *Litigation*, § 3.6(a).

One of those exceptions—the "foreign country" exception—unambiguously applies here. Another—the "assault and battery" exception—will apply in many circumstances like those alleged here. The FTCA thus provides no remedy for a category of serious harms like those asserted in this case, including the most severe harm imaginable: loss of human life.

A. The FTCA Provides No Remedy Where, As Here, The Injury Is Suffered In A Foreign Country

1. The foreign country exception to the FTCA excludes "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k).

Because liability under the FTCA is governed by the "law of the place where the act or omission occurred," 28 U.S.C. § 1346(b)(1), the most obvious function of the foreign country exception is to insulate the United States from liability based on foreign law when the tort occurs outside the borders of the United

States. Sisk, *Litigation*, § 3.6(e). However, as this Court has made clear, § 2680(k) is not limited to only those circumstances in which foreign law would apply.

In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 700-712 (2004), the Court held that the foreign country exception applied where an injury suffered in another country had been caused by tortious wrongdoing within the United States. Under *Sosa*, the foreign country exception applies to "all claims based on any *injury suffered in a foreign country*, regardless of where the tortious act or omission occurred." *Id.* at 712 (emphasis added). It is thus the locus of the injury that matters for purposes of the foreign country exception. *See* Cisneros, Note, Sosa v. Alvarez-Machain—*Restricting Access to US Courts Under the Federal Tort Claims Act and the Alien Tort Statute: Reversing the Trend*, 6 Loy. J. Pub. Int. L. 81, 92 (2004).

2. *Sosa* involved a DEA mission to kidnap, capture, and render to the United States a Mexican national who had been indicted in the torture and murder of a DEA agent. 542 U.S. at 697-698. After trial, the suspect was acquitted. *Id.* at 698. Upon his return to Mexico, the suspect brought a civil suit against a Mexican national named Jose Sosa who had participated in the mission in conjunction with the DEA and against the United States Government. *Id.* at 698-699. Alvarez-Machain's claim against the United States rested, in relevant part, on an FTCA claim of false arrest.[5] *Id.* at 698.

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[5] Importantly, once Alvarez-Machain was in the United States, his detention was no longer tortious, *see Alvarez-Machain* v. *United States*, 331 F.3d 604, 636-637 (9th Cir. 2003), *rev'd by Sosa*, 542 U.S. 692, since he was at that point under arrest for the alleged murder of the DEA agent. Alvarez-Machain's claim was

This Court held that the foreign country exception to the FTCA applied because the alleged tortious conduct was "most naturally understood as the kernel of a claim arising in a foreign country." *Sosa*, 542 U.S. at 701. It rejected the so-called "headquarters doctrine," under which the availability of the foreign country exception hinges on where the tortious *act* occurred, as opposed to the location of the injury. *See, e.g.*, *Sami* v. *United States*, 617 F.2d 755, 762 (D.C. Cir. 1979) (finding FTCA liability "for acts or omissions occurring [in the United States] which have their operative effect in another country"), *abrogated by Sosa*, 542 U.S. at 710 n.8. Rather, the Court applied a *lex loci delicti* rule, similar to the traditional choice-of-law rule at the time of the FTCA's passage. *Sosa*, 542 U.S. at 704-705.[6]

3. Under *Sosa*'s locus of the injury test, the foreign country exception would preclude an FTCA claim here. Because Hernández was shot in Mexico, it does not matter that Agent Mesa was standing in the United States when he pulled the trigger. The foreign country exception still applies, leaving Hernández's estate with no claim against the United States under the FTCA.

That was the holding of the District Court here in its dismissal of FTCA claims brought by the petitioners. Pet. App. 132-133. It was also the holding in an-

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based on his kidnapping and detention in Mexico. *Sosa*, 542 U.S. at 700-701.

[6] Justice Ginsburg, joined by Justice Breyer, would have held the foreign country exception applicable under a narrower "last significant act or omission" test. *Sosa*, 542 U.S. at 759-760 (Ginsburg, J., concurring in part and concurring in the judgment). That test might still foreclose FTCA liability in this case, as the completion of the tort occurred when the bullet struck the decedent on the Mexican side of the border.

other, virtually identical cross-border shooting case. *See Ortega-Chavez* v. *United States*, 2012 WL 5988844, at *2 (S.D. Cal. Nov. 29, 2012) (dismissing shooting victim's FTCA claim and holding that despite the tortious activity occurring in the United States, "domestic proximate causation does not eliminate application of the foreign country exception"). Other courts applying *Sosa* have reached the same result.[7]

Sosa is clear: The foreign country exception exempts from the FTCA's sovereign immunity waiver all claims based on injuries that were suffered abroad, regardless of where the tortious activity took place. The FTCA does not provide an alternative remedy in this case.

B. The FTCA Also Provides No Remedy For Most Assault And Battery Claims

1. While it does not apply in this case, another FTCA exception for intentional tort claims would also bar many claims like those asserted here, even where the locus of the alleged injury is the United States.

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[7] *E.g.*, *Agredano* v. *United States Customs Service*, 223 F. App'x 558, 558-559 (9th Cir. 2007) (foreign country exception immunized United States from suit arising from arrest and imprisonment that took place in Mexico); *Thompson* v. *Peace Corps*, 159 F. Supp. 3d 56, 60-62 (D.D.C. 2016) (foreign country exception barred claims brought by former Peace Corps volunteer alleging injuries suffered abroad but caused by anti-malarial drugs given to him by the Peace Corps); *Padilla* v. *United States*, 2007 WL 2409792, at *7-8 (W.D. Tex. Aug. 20, 2007) (applying *Sosa* rule to case where individual was killed in Mexico, even though he was abducted from his home in the United States); *Harbury* v. *Hayden*, 444 F. Supp. 2d 19, 23 (D.D.C. 2006) (action alleging torture and murder by CIA agents was barred by foreign country exception).

The FTCA excludes "[a]ny claim arising out of assault[or] battery." 28 U.S.C. § 2680(h). This exception, commonly referred to as the "assault and battery" exception, also excludes "false imprisonment, false attest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Id.* The Government thus retains its sovereign immunity as to "a very considerable portion of the law of torts." 2 Jayson & Longstreth, *Handling Federal Tort Claims*, § 13.06[1][a] (2014); *see also id.* § 13.06[1][b].

This exception would not apply here because it is itself subject to the so-called "law enforcement proviso," which waives the Government's sovereign immunity for an assault or battery based on "acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. § 2680(h); *see generally* Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. St. Thomas L.J. 375 (2011). The law enforcement proviso would likely have allowed for an FTCA claim against the government here if the shooting had occurred completely on American soil (because Border Patrol agents are law enforcement officers). *See Millbrook* v. *United States*, 133 S. Ct. 1441, 1446 (2013).

However, claims "arising out of" assaults by non-law enforcement federal employees—who of course make up the lion's share of both the federal civil service and the armed services—are generally not actionable under the FTCA, even where they involve unjustified violence and serious physical harm or death. In those cases, too, no alternative remedy to *Bivens* exists.

2. Courts have long grappled with the scope of the "assault and battery" exception, and specifically

whether ancillary claims of federal government negligence—particularly negligent hiring or supervision claims—"aris[e] out of" an assault or battery for purposes of the exception. Drawing on this Court's decision in *Sheridan* v. *United States*, 487 U.S. 392 (1988), virtually all of the Courts of Appeals have now held that such claims are also unavailable under the FTCA. *See* Sisk, *Litigation*, § 3.6(d)(3) (collecting cases).

In *Sheridan*, an "obviously intoxicated off-duty serviceman" who had just left the Bethesda Naval Hospital following his shift as a naval medical aide "fired several rifle shots into an automobile being driven by petitioners on a public street near the ... [h]ospital." 487 U.S. at 393-394. The plaintiffs in *Sheridan* brought an FTCA claim against the United States alleging governmental negligence for allowing the servicemember to leave the hospital intoxicated and armed with a loaded rifle. *Id.* at 394. Both the district court and the Fourth Circuit held that the plaintiff's claim was barred under the assault and battery exception, but this Court reversed.

The Court held that an antecedent negligence claim may lie under the FTCA even if predicated on an intervening assault or battery. *Sheridan*, 487 U.S. at 398-399. It explained that, while a *respondeat superior* theory of government liability for an assault or battery is unavailable under the "assault and battery" exception, a claim of "Government liability that is entirely independent of" the employer-employee relationship between the Government and the tortfeasor avoids the assault and battery exception entirely. *Id.* at 401.

Thus, in *Sheridan*, an FTCA claim lied notwithstanding the assault and battery exception because the naval hospital had "voluntarily adopt[ed] regulations

that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any such firearm," and "further voluntarily undert[ook] to provide care to a person who was visibly drunk and visibly armed, ... [thereby] assum[ing] responsibility" for his actions. 487 U.S. at 401. Under these circumstances, the Government would have been liable in negligence even if the servicemember "had been an unemployed civilian patient or visitor" because liability was not predicated on the servicemember's status as a federal employee. *Id.* at 402.[8]

Sheridan expressly recognized that the FTCA does not allow *respondeat superior* claims directly premised on assault and battery. And while the *Sheridan* majority did not opine on the viability of FTCA claims alleging negligent hiring, training, or supervision of a federal employee who commits an assault or battery, a plurality of the Court insisted that negligent hiring or supervision claims are in fact barred by the assault and battery exception. *See* 487 U.S. at 406-408 (Kennedy, J., concurring in the judgment) (opining that "independent governmental negligence" is a viable theory for an FTCA claim involving an assault or battery, but that "a negligent supervision or negligent hiring claim" would be barred by the exception); *id.* at 408, 411 (O'Connor, J., dissenting) (opining that the exception applies "in any case in which the battery is essential to the claim" and urging lower courts to hold the government immune from suit in negligent hiring and supervi-

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[8] The Court noted that a direct assault or battery claim also would have fallen outside of the FTCA because the "assault and battery [had been] committed by the off-duty, inebriated enlisted man ... not acting within the scope of his office or employment." *Sheridan*, 487 U.S. at 401.

sion cases); *see also* Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 Admin. L.J. Am. U. 1105, 1116-1117 (1996); Massey, Note, *A Proposal to Narrow the Assault and Battery Exception to the Federal Tort Claims Act*, 82 Tex. L. Rev. 1621, 1627-1629 (2004).

Nearly every Court of Appeals has held in the years since *Sheridan* that such claims are also barred under the FTCA's assault and battery exception. *Wilburn* v. *United States*, 616 F. App'x 848, 859 (6th Cir. 2015); *Reed* v. *USPS*, 288 F. App'x 638, 640 (11th Cir. 2008) (per curiam); *CNA* v. *United States*, 535 F.3d 132, 148-150 (3d Cir. 2008); *Olsen* v. *United States ex rel. Department of Army*, 144 F. App'x 727, 733-734 (10th Cir. 2005); *Billingsley* v. *United States*, 251 F.3d 696, 698 (8th Cir. 2001) (per curiam); *Leleux* v. *United States*, 178 F.3d 750, 756 n.5, 758 (5th Cir. 1999); *Sheridan* v. *United States*, 969 F.2d 72, 75 (4th Cir. 1992); *Guccione* v. *United States*, 878 F.2d 32, 32-33 (2d Cir. 1989); *see also LM ex rel. KM* v. *United States*, 344 F.3d 695, 699-700 (7th Cir. 2003).[9]

These courts have largely adopted the view that claims against the Government that are premised on the Government's employment relationship with an employee who commits an assault and battery are cat-

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[9] The Ninth Circuit has departed from its sister circuits in holding that that "the assault and battery exception does not immunize the Government from liability for negligently hiring and supervising an employee." *Brock* v. *United States*, 64 F.3d 1421, 1425 (9th Cir. 1995). However, the Ninth Circuit has also indicated that claims challenging decisions by policy-makers on training and supervision fail on the grounds that they "fall[] squarely within the discretionary function exception" to the FTCA. *Nurse* v. *United States*, 226 F.3d 996, 1001 (9th Cir. 2000).

egorically barred. Thus, for example, in *Billingsley*, where the plaintiff alleged that the Government had negligently failed to supervise a United States Job Corps enrollee who had "struck [plaintiff] over the head with a glass bottle and kicked him repeatedly," the Eighth Circuit held that "[t]he government would not be liable ... for its negligent hiring and supervision" of the tortfeasor as that "claim pertains to the government's employment relationship." 251 F.3d at 697, 698 (citing *Leleux*, 178 F.3d at 757, and discussing the FTCA's legislative history). Or in *CNA*, an action stemming from a violent robbery by an army recruit who stole an improperly stored weapon from an army recruiter, the Third Circuit dismissed negligent supervision claims stemming from the recruiter's conduct because the claims were not "'entirely independent' of" the recruiter's "status as a government employee," and in fact "had everything to do with [the recruiter's] employment relationship with the Army." 535 F.3d at 149.[10]

In sum: There is no theory left (other than the narrow theory embraced in *Sheridan* itself) under which the victim of an act of intentional violence by a non-law enforcement federal employee may achieve a remedy under the FTCA. The FTCA thus provides no alternative to a *Bivens* claim in numerous scenarios like the

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[10] *But see* Andrews, *So the Army Hired an Ax-Murderer: The Assault and Battery Exception to the Federal Tort Claims Act Does Not Bar Suits for Negligent Hiring, Retention and Supervision*, 78 Wash. L. Rev. 161, 191-197 (2003) (arguing that "[r]espondeat superior claims, which are based on vicarious liability and are barred by the assault and battery exception, are readily distinguishable from claims based on negligent hiring, retention and supervision").

one in this case involving an alleged physical assault or battery by a government employee.[11]

III. State Tort Remedies Are Also Unavailable In Cases Like This One By Operation Of The Westfall Act

Any state law claims brought against Agent Mesa in his individual capacity would be precluded by the Westfall Act, which makes the FTCA the exclusive remedy when a personal injury claim arises from the tortious act of a federal employee acting within the scope of their employment. 28 U.S.C. § 2679(b)(1). Such claims against Agent Mesa would be precluded even though the United States is separately immune from FTCA liability under the foreign country exception to the FTCA. *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995). As Professor Sisk has observed:

> If the federal employee is found to have acted within the scope of employment, he or she individually will be immune from liability. ... Thus, rather than expanding tort liability and enhancing the opportunity for plaintiffs to sue a financially-responsible defendant—which was

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[11] The fact that Congress saw fit to exclude claims arising in foreign countries, or founded on certain intentional torts, from the ambit of the FTCA does not weigh against allowing such claims to be asserted under *Bivens*. Indeed, such reasoning would be impossible to square with this Court's recent decision in *Simmons* v. *Himmelreich*, 136 S. Ct. 1843 (2016), where this Court held that that a *Bivens* claim could proceed even where substantively similar FTCA claims had already been dismissed pursuant to a § 2680 exception. As the Court made clear in its unanimous opinion, the FTCA's "judgment bar" provision expressly "does not apply" where a case has been dismissed pursuant to any of the exceptions. *Id.* at 1848.

> generally the intent behind state court decisions broadening the reach of *respondeat superior* in recent decades—application of liberal state scope-of-employment rules sometimes may operate to narrow tort liability in the federal employee/Federal Government context.

Sisk, *Litigation*, § 5.6(c)(4).

A. Under the Westfall Act, 28 U.S.C. § 2679, the FTCA is the exclusive remedy for torts committed by federal employees within the scope of their employment. *Id.* § 2679(b)(1). If a federal employee is sued under state law for actions that fall within the scope of their employment, the Attorney General is required to substitute the United States as the sole defendant in the case, whereupon the suit is restyled as an FTCA action and removed to federal court, while the individual employee is granted immunity for the act in question. *See id.* § 2679(c)-(d); *see also, e.g.*, *Osborn* v. *Haley*, 549 U.S. 225, 229-230 (2007).

Importantly, *Bivens* claims are expressly exempted from the Westfall Act's exclusive remedy provision. *See* 28 U.S.C. § 2679(b)(2)(A); *see also Hui* v. *Castaneda*, 559 U.S. 799, 807 (2010) (noting ("[t]he Westfall Act's explicit exception for *Bivens* claims"). But in the absence of a *Bivens* remedy, the Westfall Act may bar recovery altogether in cases like this one, where the United States is immune from suit under FTCA exceptions. *See supra* Part II.

In *Lamagno*, which involved a lawsuit by citizens of Colombia who were injured in an auto accident by a DEA agent, this Court acknowledged that under the Westfall Act, the substitution of the United States for the individual employee defendant was "unrecallable," and that once the substitution was accomplished, the

United States could be dismissed pursuant to its sovereign immunity under the foreign country exception to the FTCA. 515 U.S. at 422; *see also supra* Part I.A.1.

Accordingly, as a practical matter, once the Attorney General certifies that the alleged tortious conduct was within the scope of the tortfeasor's employment, the FTCA and *Bivens* are the only two routes to a remedy for misconduct by Government actors in myriad situations. Where, as here, FTCA claims are barred by exceptions like the foreign country exception, *Bivens* is the only remaining path. *See Lamagno*, 515 U.S. at 420 (noting that, in situations like this one, "the plaintiff may be left without a tort action against any party").

This Court addressed the Westfall Act's stark consequences recently in *Minneci*, explaining that "the potential existence of an adequate 'alternative, existing process' differs dramatically" in cases where the Westfall Act applies. 132 S. Ct. at 623. Thus, in *Minecci*, the Court held that no *Bivens* claim was available against a private employee of a federal prison who *could* be reached by state tort law, and expressly contrasted that situation with one where the defendant was a federal employee whose conduct would be covered by the Westfall Act. *Id.* (contrasting private employee scenario with *Carlson* v. *Green*, 446 U.S. 14, 16 (1980), where *Bivens* claim was available to federal prisoner).

Here, the Government has long since made its unrecallable certification that Agent Mesa was acting within the scope of his employment. There is thus no doubt that the petitioners lack a remedy in either the FTCA or in state tort law for the legal wrongs they have alleged.

Notably, Texas permits recovery in its state courts for death or personal injury in cases where the wrong-

ful act occurs in a foreign country. Tex. Civ. Prac. & Rem. Code Ann. § 71.031(a). In this case, if the suit were not converted into an FTCA action under the Westfall Act—*i.e.*, if the Westfall Act did not apply—the fact that the wrongful act took place in another country would not preclude a tort action. But the combination of the Westfall Act and the FTCA means that claims that would otherwise be cognizable in Texas state court can have no remedy except under *Bivens*.

B. The Westfall Act bars state tort-law remedies not only in this case, but in any case where a government employee defendant acted within the scope of employment under the law of the state in which the tort was committed. *E.g.*, *Bodin* v. *Vagshenian*, 462 F.3d 481, 484 (5th Cir. 2006) (citing *Williams* v. *United States*, 350 U.S. 857 (1955)). Accordingly, in states with broader *respondeat superior* liability for employers, the Westfall Act will convert a greater number of suits into FTCA actions against the Federal Government. If the Attorney General or a reviewing court finds that the employee's action was beyond the scope of employment, the suit is not converted under the Westfall Act and the plaintiff may sue the employee under state tort law. Thus, where the Federal Government is exempt from liability under one of the FTCA exceptions, a plaintiff's ability to recover damages without a *Bivens* remedy hinges entirely on whether the defendant acted within the scope of employment. *Lamagno*, 515 U.S. at 421-422.

But particularly under liberal *respondeat superior* rules in many states, plaintiffs have little chance of resisting a scope of employment certification. Here, for example, under Texas law, assault falls within the scope of employment for the purposes of *respondeat superior* where the employee is authorized to use force in the performance of his or her duties "so that the act

of using force may be in furtherance of the employer's business, making him liable even when greater force is used than is necessary." *Texas & Pac. Ry.* v. *Hagenloh*, 247 S.W.2d 236, 239 (Tex. 1952). *Respondeat superior* applies if the assault is "so connected with and immediately arising out of authorized employment tasks as to merge the task and the assaultive conduct into one indivisible tort imputed to the employer." *Buck* v. *Blum*, 130 S.W.3d 285, 289 (Tex. App. 2004).

Under that standard, and on the facts of this case, the Attorney General's determination that Mesa's actions fell within the scope of employment under Texas law—effectively precluding recovery under both state law and, because of the foreign country exception, the FTCA—would have been extremely difficult to contest.[12]

And while *respondeat superior* standards for intentional torts vary widely by state, Texas's approach is actually narrower than most—*i.e.*, under the law of most states, contesting the application of the Westfall Act would have been *even more difficult*. For example, California provides that an employee's willful, malicious, or even criminal acts may fall within the scope of employment, even if unauthorized, if they foreseeably arose from the conduct of the employer. *E.g.*, *Xue Lu* v. *Powell*, 621 F.3d 944, 948 (9th Cir. 2010).

The broader evolution of the law in this area, toward increasingly liberal *respondeat superior* rules, thus yields paradoxical results. "[O]ver time, state law

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[12] It is therefore unsurprising that petitioners "could have sought (but did not seek) federal-court review of the Attorney General's scope-of-employment certification under the Westfall Act." Pet. App. 48 (Haynes, J., concurring).

rules have tended to broaden the scope of employment concept so as to expand employer accountability to others for the misdeeds of employees." Sisk, *Litigation*, § 5.6(c)(4). But "[i]ronically—or some might say, perversely—application of these state law expectations to the peculiar Westfall Act context may have precisely the opposite effect." *Id.*

Absent an available *Bivens* claim, in situations where the federal government is immune from liability, a considerable number of tort victims in states with broad approaches to *respondeat superior* may find themselves with no remedy at all.

CONCLUSION

In addressing whether a *Bivens* claim may be asserted in this case, this Court should consider that no adequate alternative remedy exists under either the FTCA or state tort law.

Respectfully submitted.

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Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

CORRECTED COPY

v.

JESUS MESA, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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STATEMENT OF INTEREST[1]

Amici are ten law professors who research, write, and teach about qualified immunity, constitutional law, and constitutional litigation. *See* Appendix (listing *Amici*). *Amici* have an interest in how qualified immunity operates and are concerned with the way the Fifth Circuit framed the "clearly established" question. The qualified-immunity issue before the Court is within *Amici*'s areas of expertise.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

If Mesa had shot and killed a fifteen-year-old United States citizen under the circumstances alleged here, there would be no doubt that he violated the Constitution, and clearly so. He would not deserve immunity.

The qualified-immunity question in this case is this: Does the result change because of facts—specifically, the boy's citizenship status and his connections to the United States—that Mesa did not know at the time of the shooting? The answer is no, because qualified immunity does not turn on facts that officers do not know when they act.

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

Focusing then on the facts known to Mesa: Mesa shot an unarmed boy in Mexico near the U.S. border without any provocation or justification. Because that is a clear violation of the Constitution, and because granting qualified immunity in these circumstances would run counter to the doctrine's purpose, Mesa should be subject to suit. He should not be permitted to capitalize on the "fortuitous" circumstance that the victim of his callous conduct happened to be a Mexican citizen.

ARGUMENT

I. HERNÁNDEZ'S CITIZENSHIP STATUS, LIKE ANY UNKNOWN FACT, IS NOT PART OF THE "CLEARLY ESTABLISHED" INQUIRY

The qualified-immunity inquiry asks two separate questions: (1) Did the officer violate a constitutional right, and (2) was that right clearly established at the time of the officer's conduct? *Pearson v. Callahan*, 555 U.S. 223 (2009). [2] Hernández's citizenship and connections to the United States are facts that may be relevant to the first question—whether Mesa violated Hernández's constitutional rights. *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). This brief does not address the first question, and instead assumes that the officer violated a constitutional right.

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[2] A court may take up either question first and, if it finds the answer is "no," it may grant immunity without considering the other question. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

This brief instead focuses on the second question: whether it was unclear that Mesa's conduct was unlawful. Hernández's citizenship and connections to the United States are irrelevant to that question, because Mesa was not aware of them at the time he acted. In determining that Mesa was entitled to qualified immunity, however, the Fifth Circuit relied on those facts; the court asked whether it was clearly established that shooting "a non-citizen with no connections to the United States" in Mexico violated the U.S. Constitution. Pet. App. 4a. Based on that formulation of the question, the Fifth Circuit held that Mesa is immune from suit. Pet. App. 4a–7a (citing, *e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Verdugo-Urquidez*, 494 U.S. 259).

The Fifth Circuit erred in framing the inquiry this way. It instead should have asked whether the shooting was clearly unlawful given the circumstances known to Mesa *at the time he pulled the trigger*.

A. The "clearly established" analysis considers only facts known to officers at the time of their conduct.

Qualified immunity is unavailable where "it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (emphasis added). This "clearly established" inquiry focuses on the moment of conduct—by probing the facts that the officer knew and observed at the time of the incident, and the state of the law at that time. *Id.* The inquiry is objective rather than subjective; it asks

not whether *this* officer in fact knew his conduct was unlawful, but instead whether a reasonable officer would have known the challenged conduct was unlawful in the circumstances the officer confronted. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

In assessing the availability of qualified immunity, therefore, the first step is to identify the information known by the officer. Like other standards that evaluate an officer's objective reasonableness in the specific situation he confronts, the qualified-immunity standard asks courts to consider "the facts available to the officer at the moment [of his conduct]," and only those facts. *See Terry v. Ohio*, 392 U.S. 1, 21–22 (1968) (reasonable suspicion); *see also Beck v. Ohio*, 379 U.S. 89, 96 (1964) (probable cause). Later-discovered facts are irrelevant, even when those facts might change the way a reasonable officer would handle the situation. As the Court has explained in the analogous context of the Fourth Amendment reasonableness standard: "A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). *See generally* Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187 (1993).

For example, when officers engage in a suspicionless search or seizure of someone who is on parole, the qualified-immunity inquiry takes into account the individual's parole status only if the officers knew that status at the time of the search or

seizure. *Moreno v. Baca*, 431 F.3d 633, 642 (9th Cir. 2005). If the officers were "aware that [the individual] was on parole," the Constitution permits them to undertake the suspicionless search. *Samson v. California*, 547 U.S. 843, 846, 856–57 (2006). But if the individual's parole status is "unknown to [the officers] at the time of their actions and [i]s not a fact on which [they] relied," it is not a fact that can "justify their conduct." *Moreno*, 431 F.3d at 642. In that circumstance, the qualified-immunity inquiry asks simply whether a reasonable officer would believe he could engage in a suspicionless search or seizure generally, and the answer is clearly no. *Id.* Qualified immunity is unavailable.

The same analysis applies when officers enter a home without probable cause and discover exigent circumstances only after entry. *DeMayo v. Nugent*, 517 F.3d 11, 15–16 & n.6 (1st Cir. 2008). In assessing the applicability of qualified immunity, courts ask what the officers knew at the time of their conduct, not what they later discovered. Where officers are aware of facts that provide "an objectively reasonable basis for believing" that exigent circumstances exist at the time of the warrantless search, their conduct is lawful. *Brigham City v. Stuart*, 547 U.S. 398, 400–04 (2006). But where an officer is ignorant of the exigency, the exigency is irrelevant to the "clearly established" analysis. In that case, the question is whether a reasonable officer would have known it was unlawful to engage in a warrantless search generally (*i.e.*, without exigent circumstances). *DeMayo*, 517 F.3d

at 18. Because the unlawfulness of such a search is clear, qualified immunity is inappropriate. *Id.* "[O]bjectively unreasonable [conduct] does not become reasonable simply because [of] the fortuity of the circumstances." *Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002).

The standard works both ways: Objectively reasonable conduct does not become *un*reasonable because of facts that an officer does not know. Suppose, for example, that an officer handcuffs a suspect using a "common non-excessive handcuffing technique," but because of the suspect's recent elbow surgery, the handcuffing causes injuries so severe that the suspect's arm must later be amputated. *See Rodriguez v. Farrell*, 280 F.3d 1341, 1352 (11th Cir. 2002). The officer nevertheless deserves immunity, because courts "do not use hindsight to judge the acts of police officers; [they] look at what they knew (or reasonably should have known) at the time of the act." *Id.* at 1352–53. "What would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time." *Id.* at 1353. Because it would be unreasonable to demand omniscience from an officer, the law does not equate what we know *now* with what the officer knew *then*.

The cases on which the Government relied below only bolster the point. In *Ali v. Rumsfeld*, for example, the D.C. Circuit accounted for the citizenship status of the plaintiffs in the qualified-immunity analysis because the officials knew that

the plaintiffs were "aliens held in Iraq and Afghanistan," not U.S. citizens. 649 F.3d 762, 771 (D.C. Cir. 2011); *accord Lebron v. Rumsfeld*, 670 F.3d 540, 557–59 (4th Cir. 2012) (same, for known "terrorist suspect"); *Rasul v. Myers*, 563 F.3d 527, 532 (D.C. Cir. 2009) (per curiam) (same, for enemy combatants at Guantanamo Bay). And in *Kwai Fun Wong v. United States*, the Ninth Circuit considered the plaintiff's alien status, because the INS officials knew that the plaintiff was an "alien[] in . . . rather unique circumstances." 373 F.3d 952, 976 (9th Cir. 2004); *see also Key v. Grayson*, 179 F.3d 996, 999–1000 (6th Cir. 1999) (prisoner's status correctly considered when known at the time).

The proper inquiry here thus is not whether Mesa violated clearly established law by shooting "a non-citizen with no connections to the United States." Pet. App. 4a. Unless Mesa was aware that Hernández was a non-U.S. citizen who lacked connections to the United States, the Court should not import those facts into the "clearly established" inquiry. Just as an individual's elbow surgery or parole status is irrelevant at this stage of the analysis when unknown to an officer, so too is citizenship status.

B. Mesa was unaware of Hernández's citizenship status and connections to the United States.

At the time of the shooting, Mesa was not aware that Hernández was a non-citizen without

connections to the United States.[3] Those facts therefore do not inform the qualified-immunity inquiry.

As alleged in the Second Amended Complaint ("Complaint"), when Mesa shot and killed Hernández, Mesa was aware of the following:

- Hernández was a boy. Second Am. Compl. ¶ 26.
- Hernández and his friends, all young boys, were laughing and playing near the United States–Mexico border. *Id.* ¶ 25.
- Hernández and his friends were running to and from the border fence, on the Mexican side of the border. *Id.*
- Mesa approached the boys and forcibly detained one of them. *Id.* ¶ 26.
- Hernández retreated and stood beneath a bridge. *Id.*
- Hernández did not appear to be armed. *Id.* ¶ 1.
- Hernández did not threaten Mesa in any way. *Id.* ¶ 26.

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[3] Indeed, Mesa has effectively conceded as much at the motion-to-dismiss stage. Before the district court and the court of appeals, he never raised any argument that, on the facts alleged in the complaint, he could have known that Hernández was a non-citizen without ties to the United States. He has thus forfeited any such argument. *See OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015).

- Hernández offered no resistance. *Id.* ¶ 3.
- Mesa, who stood on the U.S. side of the border, pointed his gun at Hernández and fired at least two bullets at him. *Id.* ¶ 26.
- Hernández was struck by the gunfire and died. *Id.*

These facts—those that, according to the Complaint, Mesa directly observed—are the only facts incorporated into the "clearly established" analysis. Mesa did not know Hernández's citizenship status, or the quantity or quality of his ties with the United States. Those later-discovered facts, therefore, do not inform the inquiry. The question is simply: Did Mesa violate clearly established law when he shot and killed a boy just on the Mexican side of the border, when the boy had offered no resistance, had no weapon, and had not threatened him?

II. QUALIFIED IMMUNITY DOES NOT PROTECT MESA

Given the facts known to Mesa at the time of the shooting, Mesa engaged in conduct that no reasonable officer would believe is constitutional. He therefore is not entitled to qualified immunity.

A. It is clearly established that fatally shooting someone without justification violates the Constitution.

No reasonable officer could have believed that Mesa's conduct "complie[d] with the law." *Pearson*, 555 U.S. at 244. On the facts alleged, Mesa fired a

lethal shot at a person who had retreated, who was "unarmed and unthreatening," and who "showed no resistance to [Mesa's] demands." Second Am. Compl. ¶¶ 3, 26. That conduct clearly violates the Constitution.

It has been clearly established for over thirty years that "seiz[ing] an unarmed, nondangerous suspect by shooting him dead" is an unreasonable seizure prohibited by the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). It is equally well established in the Fifth Circuit that, where the Fourth Amendment does not apply, substantive due process serves as a backstop. *Petta v. Rivera*, 143 F.3d 895, 901 & n.5 (5th Cir. 1998) (collecting unanimous court of appeals caselaw to that effect); *see also United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). And it is similarly clear that the Constitution's protections reach across the border. *See Verdugo-Urquidez*, 494 U.S. 259 ("the people" have Fourth Amendment rights outside U.S. borders); *see also Reid v. Covert*, 354 U.S. 1, 5–9 (1957) (plurality op.) ("[W]e reject the idea that when the United States acts against its citizens abroad it can do so free of the Bill of Rights."). Because seizing (by shooting to death) an unarmed, non-threatening, unresisting minor both is clearly "unreasonable," *see Garner*, 471 U.S. at 11, and clearly "shocks the conscience," *see Rochin v. California*, 342 U.S. 165, 172–73 (1952), any

reasonable officer in Mesa's shoes would have known killing Hernández was unconstitutional.[4]

B. An officer is not protected by qualified immunity if he acted without a reasonable factual basis to conclude that a potential exception applied.

Although it was clearly established at the time Mesa acted that killing someone without justification was unconstitutional, arguably this was not clearly established where the victim was a "citizen and resident of Mexico with no voluntary attachment to the United States." *See Verdugo-Urquidez*, 494 U.S. at 274–75 (holding that such a person has no Fourth Amendment protection against a warrantless search conducted in Mexico). One thus could argue that, as far as Mesa knew, Hernández *might* have been a Mexican citizen with no U.S. attachments, and that it therefore would have been unclear to a reasonable officer whether killing Hernández would violate the Constitution. In other words, the argument would be that Mesa is

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[4] An officer does not need to know the specific part of the Constitution his conduct violates; "the proper inquiry is whether the *right* itself—rather than its *source*—is clearly established." *Russo v. City of Bridgeport*, 479 F.3d 196, 212 (2d Cir. 2007) (collecting cases); *see also Al-Amin v. Smith*, 511 F.3d 1317, 1335 (11th Cir. 2008) ("We have never required that, in order for an official to know his conduct is unlawful, a reasonable official must be able to cite by chapter and verse all of the constitutional bases that make his conduct unlawful.").

entitled to qualified immunity based on his lack of *factual* clarity about Hernández's status.

That argument is wrong. Qualified immunity is not available to an officer who violates a clear constitutional rule without a factual basis to conclude that an exception to the rule applies. The Court most recently confirmed this principle last Term in *Utah v. Strieff*, 136 S. Ct. 2056 (2016). In that case, an officer stopped and searched Strieff without cause, in violation of the Fourth Amendment's general prohibition of suspicionless searches and seizures. There happened to be an outstanding arrest warrant for Strieff, and the question before the Court was whether, in light of the warrant, application of the exclusionary rule was necessary. Strieff contended that it was necessary to deter police misconduct: "[B]ecause of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches if the exclusionary rule is not applied." *Id.* at 2064; *see id.* at 2068–69 (Sotomayor, J., dissenting) (explaining that "[o]utstanding warrants are surprisingly common"). The Court specifically addressed this argument, concluding that the exclusion of evidence was unnecessary because the possibility of *civil liability* for police who engage in such searches and seizures is deterrence enough. *Id.* at 2064 ("Such wanton conduct would expose police to civil liability.").

The Court's reasoning thus rested upon the principle that an officer *is* subject to suit when he arrests and searches an individual without cause, if

he is unaware of facts that would authorize such a search and seizure. Said another way, the general Fourth Amendment rule requires officers to have probable cause to search someone. There is an exception to the rule for searches incident to arrest, which officers may undertake when, *inter alia*, they arrest someone on an outstanding warrant. But officers may not invoke that exception unless they know facts that would lead a reasonable officer to conclude the exception applied. They cannot claim qualified immunity on the ground that it was unclear whether the exception applied, because they lacked *factual* information relevant to the exception. And that is the case no matter how "prescient the officer's instincts may have been": Courts "cannot grant immunity for decisions merely because *ex post* they seem to have been good ones, any more than [they] could hold officers liable for decisions that seemed reasonable when made but subsequently turned out to be wrong." *Myers v. Patterson*, 819 F.3d 625, 636 (2d Cir. 2016). Qualified immunity is unavailable to an officer who violates a clear constitutional rule, unless he has an affirmative factual basis to conclude an exception to that rule applies.

Similarly, the Fourth Amendment generally requires that an officer have probable cause before swabbing someone's cheek for DNA, but there is an exception for people who have been arrested for violent crimes. *See Maryland v. King*, 133 S. Ct. 1958, 1980 (2013). When an officer swabs someone's cheek without any knowledge one way or the other

about whether she is an arrestee, that factual void does not permit the officer to claim qualified immunity for his conduct. And, to return to the example above, qualified immunity plainly does not protect the officer who conducts a suspicionless search without any factual basis for concluding that the person being searched is or is not a parolee. *Moreno*, 431 F.3d at 642.

Just so with other exceptions to Fourth Amendment rules. An officer is not immune when he searches someone's house without reason to think that valid consent was given (even if it turns out that it was). *Cf. Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990). An officer is not immune when he conducts a *Terry* frisk without reason to think that there was suspicious or dangerous behavior (even if it turns out that there was). And so on.

The same reasoning applies in the circumstances here. It is clearly established that an officer may not unjustifiably shoot someone. If an officer lacks knowledge of facts that could lead a reasonable officer to believe an exception to the general rule applies, the exception is inapplicable and qualified immunity is unavailable. "Such wanton conduct . . . expose[s] [the officer] to civil liability." *Strieff*, 136 S. Ct. at 2064.

C. Mesa acted without a reasonable factual basis to conclude that a potential exception applied.

Even if an officer might have reasonably believed the Constitution did not prohibit the unjustifiable

killing of a non-citizen without ties to the United States, the facts available to Mesa did not support a reasonable inference that Hernández fit that description. (Indeed, Mesa has never suggested otherwise.) Thus, on the facts known to Mesa, an officer would not have reasonably concluded that he could kill Hernández without violating the Constitution.

Mesa shot Hernández without knowledge that Hernández was a non-citizen who lacked connections to the United States. He knew simply that Hernández was a boy playing near the United States–Mexico border on the Mexican side, and that he was unarmed and nonthreatening. *See supra* Part I.B. With only these facts available, a reasonable officer would not have concluded that Hernández lacked citizenship in or ties to the United States.

As an initial matter, a reasonable officer would not have believed Hernández was a non-citizen simply because of where Hernández was standing at the time of the shooting—on the Mexico side of the border. Indeed, over a million U.S. citizens live in Mexico, with the largest concentration found on the U.S.–Mexico border. *See* Adam Taylor, *Mexico has its own immigration problem: American retirees*, WASH. POST (Nov. 21, 2014), goo.gl/6wPxZM; Ernesto Rodriguez Chavez & Salvador Cobo, *Extranjeros Residentes en Mexico*, INSTITUTO NACIONAL DE MIGRACIÓN, Tbl. 1 at 35 (2012), https://goo.gl/i7QZxy. And about six hundred thousand of those citizens are minors, just like Hernández. *See* Santiago David

Távara, *Niños nacidos en EE.UU. que viven en México necesitan documentos*, EL TIEMPO LATINO (Feb. 25, 2015), goo.gl/AGCVno.

Many millions more citizens travel to and from Mexico on a regular basis, especially in the El Paso area. With its population of 2.5 million people, the El Paso–Juarez–Las Cruces region is "one of the largest binational regions in the world." Alana Semuels, *Crossing the Mexican-American Border, Every Day*, THE ATLANTIC (Jan. 25, 2016), goo.gl/d5lVp8 (hereinafter "*Crossing the Mexican-American Border*"). U.S. citizens and U.S. residents regularly travel back and forth for school, for work, or for family. *Id.*; *see* U.S. State Department, *U.S. Relations With Mexico: Fact Sheet*, BUREAU OF PUBLIC AFFAIRS (July 12, 2016), goo.gl/XQQa8O. There is even a Spanish word—*transfronterizos*—for young U.S. citizens whose families have returned to Mexico but who cross the border each day to attend American schools. *See* Patricia Leigh Brown, *Young U.S. Citizens in Mexico Brave Risks for American Schools*, N.Y. TIMES (Jan. 16, 2012), goo.gl/IeU6Q4. "[T]he borderland has evolved into an increasingly interdependent regional space" that is "highly integrated" and that "largely ignores the international boundary." Wilson Center, *The State of the Border Report: A Comprehensive Analysis of the U.S.-Mexico Border*, BORDER RESEARCH P'SHIP 30–31 (May 2013), goo.gl/j8z8Wm. It would not have been reasonable for Mesa to conclude that Hernández was a non-citizen based on his presence at the place he was killed.

Nor would it have been reasonable to conclude that Hernández was a non-citizen based on his race or color. Linking race and color to citizenship is, to say the least, not reliable in this country. As of July 2014, fifty-five million Hispanic Americans lived in the United States, many in Southern Texas. *See* United States Census Bureau, *FFF: Hispanic Heritage Month 2015* (Sept. 14, 2015), goo.gl/BapNmh. Mesa is himself an Hispanic American.

Moreover, the facts known to Mesa could not have supported a reasonable conclusion about Hernández's U.S. connections. Had Hernández just returned from school in the United States? "Thousands of people cross both ways over the border every day," including "Mexican elementary kids heading to U.S. public schools." *See Crossing the Mexican-American Border*. Did Hernández have family in the United States? In one nearly identical case out of Arizona, a border patrol agent shot a boy, in Mexico. It turned out that the boy, like thousands of other Mexicans living near the border, "had strong familial connections to the United States. Both his grandparents were legal permanent residents (now citizens) of the United States residing in Nogales, Arizona." *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1036 (D. Ariz. 2015). These questions and more would have been impossible for an officer to reasonably answer based on the quick look Mesa got of Hernández.

Holding that an officer could have reasonably inferred that Hernández was a non-citizen without

ties to the United States, and that Mesa is entitled to qualified immunity on that basis, would have frightening implications. It would mean that officers could viciously shoot *anyone* on the Mexican side of the border and be entitled to qualified immunity, unless they had information affirmatively showing that the victim *was* a U.S. citizen or *did* have U.S. connections. This would apply as much to U.S. citizens as to non-citizens. If simply being on the Mexican side of the border gives an officer grounds to reasonably believe that the victim is a non-citizen without U.S. connections, and if this entitles the officer to immunity, then the officer gets immunity even when it turns out that the victim is a U.S. citizen or has U.S. connections. *Cf. Pearson*, 555 U.S. at 231 (stating that qualified immunity applies when the official's error is a mistake of fact or a mistake of law). The Government conceded as much below, arguing that qualified immunity protects an officer who takes "a risk" that he is violating constitutional rights by shooting someone who "turn[s] out to be a U.S. citizen." Gov't En Banc Br., 2015 WL 136278, at *47. The Government's striking nonchalance aside, that cannot be the law.

None of this is to say that one's citizenship status or connections to the United States are always irrelevant in the qualified-immunity analysis. They may be relevant if, at the time an officer acts, he knows facts that bear on an individual's citizenship or connections. Assume, for example, that just before a shooting like this one, the victim had shown the officer her Texas ID, pleading for the officer to

treat her better because she was a United States citizen. That fact would be relevant to the analysis. Or assume that just before this shooting, Hernández had told Mesa that he was a Mexican citizen and had never been to the United States. Those facts would be relevant. Or assume that officials use a drone strike to kill people in Pakistan, who they have strong reason to believe are non-citizen terrorists. Those facts would be relevant. But nothing of the sort happened here.

Moreover, as discussed above, *see supra* at 2, Hernández's citizenship status and connections to the United States may indeed be relevant in this case, just not in the "clearly established" part of the analysis. They may bear on the question of whether Mesa violated the Constitution, if the Court determines that the Fourth or Fifth Amendment's extraterritorial reach depends upon the victim's citizenship status and connections. But once the Court answers (or assumes the answer to) that question, facts unknown to Mesa are not taken into account *again* at the "clearly established" stage.

Because a reasonable officer would not have believed that it was constitutional to shoot Hernández in the circumstances known to Mesa, qualified immunity does not shield Mesa's conduct.

III. PROTECTING MESA FROM LIABILITY HERE UNDERMINES RATHER THAN FURTHERS THE GOALS OF QUALIFIED IMMUNITY

Immunizing Mesa would further none of the goals underlying qualified immunity, and would instead severely undermine them. The doctrine was never meant to "provide [a] license to lawless conduct." *Harlow*, 457 U.S. at 819. Yet that is all immunizing Mesa would do.

A. Qualified immunity applies only when it furthers the doctrine's purposes.

Qualified immunity is a judicially created doctrine designed to strike a careful balance between two "fundamentally antagonistic social policies": vindicating constitutional guarantees on the one hand, and immunizing reasonable officials on the other. *Barr v. Matteo*, 360 U.S. 564, 576 (1959) (plurality op.); *see Pearson*, 555 U.S. at 231. When extending immunity fails to strike the right balance between those competing goals, the Court should not apply it.

As to the first goal, it has been an "indisputable rule" since before our founding that remedies generally accompany rights. 3 WILLIAM BLACKSTONE, COMMENTARIES *23, *109; *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.). It thus "go[es] without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others . . . should not escape liability for the injuries he may so cause; and, if it were possible in

practice to confine such complaints to the guilty, it would be monstrous to deny recovery." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.).

Yet on the other side of the balance, courts have long recognized that it is vital to the effective functioning of government to protect officials who behave reasonably. Since common law, lower executive-branch officials have been immunized when they do their jobs "reasonably," even if they violate the law. *Imbler v. Pachtman*, 424 U.S. 409, 419 (1976) (collecting cases); *see also, e.g.*, *Pierson v. Ray*, 386 U.S. 547, 557 (1967). The Court has imported this common-law immunity into *Bivens* actions when the history and "general policy considerations" behind the immunity support applying the doctrine. *Butz v. Economou*, 438 U.S. 478, 500–04 (1978); *see Owen v. City of Independence*, 445 U.S. 622, 637 (1980).

In developing the qualified-immunity doctrine—and in maintaining the careful balance between the doctrine's competing goals—the Court asks "[w]hether the immunity doctrine's *purposes* warrant immunity." *Richardson v. McKnight*, 521 U.S. 399, 407 (1997). Because immunity "has in large part been of judicial making," *Butz*, 438 U.S. at 501–02, the Court has "forthright[ly]" "revis[ed] the immunity defense for policy reasons." *Crawford-El v. Britton*, 523 U.S. 574, 595 n.15 (1998); *see, e.g.*, *Harlow*, 457 U.S. at 815–16. The doctrine must strike the proper "balance between the evils

inevitable in any available alternative." *Harlow*, 457 U.S. at 813.

B. Granting immunity here furthers none of the doctrine's purposes.

"[T]he reasons [the Court] ha[s] given for recognizing immunity . . . counsel[] against" applying it here. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012); *see Tower v. Glover*, 467 U.S. 914, 920 (1984). Officials should be given immunity when they make "reasonable mistakes . . . as to the legal constraints on particular police conduct" or as to the facts on the ground. *Saucier*, 533 U.S. at 205. That is because often "the public interest calls for [official] action which may turn out to be founded on a mistake." *Gregoire*, 177 F.2d at 581. For the sake of "the effective functioning of government," an officer who engages in such conduct enjoys immunity, *Butz*, 438 U.S. at 481—"even although an individual may suffer by his mistake," *Kendall v. Stokes*, 44 U.S. 87, 98 (1845).

This serves three functions. *First*, and most importantly, it ensures that officers will not discharge their duties with "unwarranted timidity"—that they will not hesitate to properly execute the law because they fear being sued. *Richardson*, 521 U.S. at 408. By removing the specter of liability, qualified immunity offers officials a "zone of protection," *Butz*, 438 U.S. at 501, "breathing room to make reasonable but mistaken judgments," *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Knowing that they will be immunized if they act reasonably, officers can act "with the

decisiveness and the judgment required by the public good," *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974), and "vigorous[ly] exercise [their] official authority," *Butz*, 438 U.S. at 506.

Second, qualified immunity "ensure[s] that talented candidates [will] not [be] deterred by the threat of damages suits from entering public service." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992). Society wants "able people" to serve, *Harlow*, 457 U.S. at 816, but the threat of lawsuits for even reasonable mistakes understandably may prevent those people from entering public service.

Third, qualified immunity heads off "insubstantial" claims, protecting against the unwarranted "disruption of government." *Id.* at 818. Government officers have important duties to discharge, and should not have to ignore those duties to come to court each time a plaintiff creates a factual dispute sufficient to get past summary judgment. The doctrine of qualified immunity allows a court to assess cases up front, and screen out those where officials' actions were objectively reasonable.

"These rationales are not transferable" to Mesa. *Wyatt*, 504 U.S. at 168. *First*, denying immunity for the type of conduct at issue here would not hamper legitimate law enforcement efforts of border agents. If border agents were aware that immunity is unavailable for such conduct, they would not be less willing to use force in the future—when the circumstances call for it. That is because the circumstances alleged in the Complaint clearly did not call for deadly force. Border agents thus still

have plenty of "breathing room to make reasonable but mistaken judgments." *al-Kidd*, 563 U.S. at 743.

Second, denying Mesa immunity plainly would not deter people from entering public service. Apart from those with sadistic motives, no reasonable person would avoid becoming a border agent because he cannot use deadly force on a nonthreatening fifteen-year-old just across the border. Any individuals who would avoid the job for that reason *should* be deterred; they are not the "able people" the public seeks. *Harlow*, 457 U.S. at 816.

Third, denying immunity here would not invite insubstantial claims. An innocent boy was shot and killed without any justification, and his family has strong claims that he should recover under the Constitution. Mesa may prevail at summary judgment or at trial, if it turns out that the facts do not align with the allegations in the Complaint. But at this point, under these facts, Hernández's claims are anything but "insubstantial."

Mesa's conduct was not remotely close to the kind of "reasonable mistake" qualified-immunity doctrine seeks to protect. Even if Mesa's conduct was not malicious, it was "an unacceptable error indicating gross incompetence or neglect of duty," "outside the range of the professional competence expected of an officer." *Malley v. Briggs*, 475 U.S. 335, 346 n.9 (1986). Every officer should know not to kill a defenseless and nonthreatening boy, no matter his citizenship status. Immunity in these circumstances would reward Mesa for behavior that was, to say the least, obviously unlawful.

Qualified immunity aims "to safeguard government, and thereby to protect the public at large," not "to benefit its agents." *Wyatt*, 504 U.S. at 168. But applying it here would achieve the opposite result: It would benefit an unfit agent, at the expense of an innocent child, his family, and the public at large, and without benefit to any government interest. Qualified immunity is inappropriate.

C. Immunizing Mesa undermines the goals of qualified immunity.

Though there is no reason to grant immunity, there is plenty of reason to deny it. The value on the other side of the balance—ensuring the "vindication of constitutional guarantees," *Butz*, 438 U.S. at 481—applies with full force.

Border agents' immunity is "qualified" for a reason. "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814. That is the principal reason why the Court has denied "absolute immunity to most public officers." *Id.*; *see Butz*, 438 U.S. at 505. "There must indeed be means of punishing public officers who have been truant to their duties." *Gregoire*, 177 F.2d at 581. The law thus allows plaintiffs with legitimate constitutional claims to proceed with their case when the officer acted unreasonably. That is this case.

Permitting this case to proceed offers petitioners the chance to vindicate Hernández's constitutional

rights. If the Court reaches the question of immunity, it will have held (or assumed) that the Complaint states a valid constitutional claim, and that a right of action exists. To nonetheless dismiss this case on immunity grounds, in the face of unreasonable officer conduct, would unfairly and prematurely deny a remedy.

The qualified nature of an official's immunity has another important consequence. Imposing liability upon officers who act unreasonably not only vindicates victims' constitutional rights but also deters rogue officers who would otherwise act unlawfully. That is of course the intended effect of civil tort suits—to "deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner." *Barr*, 360 U.S. at 576 (plurality op.). Thus, if this case proceeds, border agents in the future may be less likely to "us[e] the badge of their authority to deprive individuals of their federally guaranteed rights." *Wyatt*, 504 U.S. at 161. A ruling that immunity does not protect Mesa will properly deter future officers from engaging in lawless conduct, while any other result will lead to under-deterrence.

A civil suit in some instances may be the *only* thing that deters officers from engaging in "wanton conduct." *E.g.*, *Strieff*, 136 S. Ct. at 2064. That seems to be the case here. Unless this case is permitted to proceed, Mesa will likely never be held to account for his egregious conduct, and his very public example may invite future officer misconduct. Indeed, the United States declined to prosecute

Mesa, and it has refused to extradite him to Mexico so that he can be prosecuted there. *See* DOJ Press Release, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca* (Apr. 27, 2012), goo.gl/i3WuPt; Adam Liptak, *An Agent Shot a Boy Across the U.S. Border. Can His Parents Sue?*, N.Y. TIMES (Oct. 17, 2016), goo.gl/whVTIR. The Court has the chance to avoid that troubling result, and in the process allow the Hernández family to vindicate their son's constitutional rights. It should hold that qualified immunity does not protect Mesa.

* * *

Executive officers have never been protected from liability for "discharg[ing] their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule." *Butz*, 438 U.S. at 507. Immunizing Mesa breaks from that precedent, furthers no legitimate purpose, and disserves the goal of remedying wrongs. The Court should not do it.

For these reasons, we urge the Court to hold that, if a cause of action and a constitutional claim exist, this litigation may proceed. Mesa does not deserve immunity.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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